

**A STUDY OF TANZANIA'S NON-COMPLIANCE WITH ITS OBLIGATION  
TO DOMESTICATE INTERNATIONAL JUVENILE JUSTICE STANDARDS  
IN COMPARISON WITH SOUTH AFRICA**

**JULIUS CLEMENT MASHAMBA**

**A THESIS SUBMITTED IN FULFILLMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (Ph.D.) OF  
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**2013**

### **CERTIFICATION**

We, the undersigned, hereby certify that we have supervised and thoroughly read the thesis and we have found it to be in the form acceptable for submission as it is an original work of the author.

Main Supervisor's Signature: \_\_\_\_\_

**PROF. MOHAMMED S. HUSSAIN**

DATED at Dar es Salaam this..... day of ....., 2013

Co-Supervisor's Signature: \_\_\_\_\_

**DR. PAUL KIHWELO**

DATED at Dar es Salaam this..... day of ....., 2013

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DATED at Dar es Salaam this..... day of ..... 2013

## **DEDICATION**

To all African children who suffer unnoticed behind bars.

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## **ABSTRACT**

This study aims at making a comparative examination of the administration of juvenile justice systems in South Africa and Tanzania with a view to establishing the extent to which the Tanzanian Government has effectively honoured its obligations to domesticated international juvenile justice standards for the protection of the rights of children in conflict with the law. Divided into eight chapters, the methodology adopted by this study is the “legal centralism approach”, which centres on the laws that are made and enforced by the state. In this context, the study employed both field and library research; whereby relevant international human rights instruments and municipal laws were analysed in the context of data obtained from the field.

In the main, the study has noted that, whereas South Africa has effectively domesticated international juvenile justice standards in the Child Justice Act (the CJA), Tanzania has not effectively domesticated those standards because provisions relating to children in conflict with the law as set out in Part IX of the Tanzanian Law of the Child Act (the LCA) are not sufficient to adequately protect the rights of offending children. As such, the thesis has recommended for the amelioration of this situation, including constitutionalisation of child rights and enacting a specific law to protect the rights of children in conflict with the law. The proposed constitutional and legislative reforms can help to spell out the juvenile justice system, prerequisite structures, procedures, specialized staff and premises for processing child offenders.

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## LIST OF ABBREVIATIONS

A.C.	Appeal Cases
A.I.R.	All India Reports
ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACHPR	African Charter on Human and Peoples' Rights
AComHPR	African Commission on Human and Peoples' Rights
ACRWC	African Charter on the Rights and Welfare of the Child
ACtHPR	African Court on Human and Peoples' Rights
Ag. J.	Acting Judge
All E.R.	All England Reports
ASP	Afro-Shirazi Party
ATC	Air Tanzania Corporation
AU	African Union
Aus.	Australia
BOT	Bank of Tanzania
C.I.D.	Criminal Investigation Department
C.J.	Chief Justice
c/s	Contrary to Section
CA	Court of Appeal
CAN\$	Canadian Dollar
Cap.	Chapter (of the Tanzanian Laws)
Cap.	Chapter of Laws
CAT	Court of Appeal of Tanzania
CC	Constitutional Court (of South Africa).
CCM	<i>Chama cha Mapinduzi</i>

CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	Convention on the Elimination of Racial Discrimination
CHE	Community Homes with Education (UK)
	Children
CHRAGG	Commission for Human Rights and Good Governance
CJA	Child Justice Act (South Africa)
Co.	Company
CODESRIA	Council for Development of Economic and Social Research in Africa
CPA	Criminal Procedure Act
CPC	Civil Procedure Code
CRC	Convention on the Rights of the Child
CYCC	Child and Youth Care Centre (South Africa)
D.C.I.	Director of Criminal Investigation
D.P.P	Director of Public Prosecutions
d/o	Daughter of
DC	District Commissioner
DCHR	Danish Centre for Human Rights
DIHR	Danish Institute for Human Rights
DSW	Department of Social Welfare
DW	Defence Witness
E.A.C.A.	Eastern Africa Court of Appeal Reports
e.g.	<i>exempli gratia</i> (for example)
E.H.R.R.	European Human Rights Reports
EALR	East Africa Law Reports

ECHR	European Convention on Human Rights
ECOSOC	Economic and Social Council (UN)
ECOSOCC	Economic, Social and Cultural Council (AU)
ECtHR	European Court of Human Rights
Ed.	Editor (eds. – editors)
ERP	Economic Recovery Programme
ESC	Economic, Social and Cultural (Rights)
et al	<i>et alii</i> (and other people; <i>et alia</i> (and other things)
et seq.	<i>et sequentes</i> (and the following)
etc.	<i>et cetera</i> (and the rest or and all others)
FILMUP	Financial and Legal Management Upgrading
FO	Foreign Office
G.N.	Government Notice
H.C.	High Court
H.C.D.	High Court Digest
H.L.	House of Lords
Hon.	Honourable
i.e.	<i>id est</i> (that is)
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICHRP	International Council on Human Rights Policy
ICJ	International Commission of Jurists (also International Court of Justice)
ILO	International Labour Organisation
Ind.	India

IPJJ	Interagency Panel on Juvenile Justice
ISCCJ	Inter-Sectoral Committee on Child Justice
IT	Intermediate Treatment (UK)
J.A.	Justice of Appeal
J.K.	<i>Jaji Kiongozi</i> (Principal Judge)
JSC	Justice of the Supreme Court (Ghana)
J.	Judge
K.B.	King's Bench
L.J.	Lord Justice
LCA	Law of the Child Act/Law of Contract Act
LL.B.	( <i>L. Legum Baccalaureus</i> ) Bachelor of Laws Degree
LL.M.	( <i>L. Legum Magister</i> ) Master of Laws Degree
LRC	Law Reports of the Commonwealth/Law Reform Commission (of Tanzania)
LRT	Law Reports of Tanzania
LST	Law School of Tanzania
M.R.	Master of Rolls
MACR	Minimum age of criminal responsibility
MCDGC	Ministry of Community Development, Gender and
MKUKUTA	<i>Mkakati wa Kukuza Uchumi na Kuondoa Umasikini</i> ( <i>Tanzania National Strategy for Growth and Reduction of Poverty</i> )
MoCLA	Ministry of Constitutional and Legal Affairs
MP	Member of Parliament
N.B.	<i>Nota Bene</i> (Note)
NEPAD	New Partnership for Africa's Development



NESP	National Economic Survival Programme
NGO	Non-Governmental Organisation
NHRI	National Human Rights Institution
Nig.	Nigeria
No.	<i>numero</i> (Number)
NSGRP	National Strategy for Growth and Reduction of Poverty
NUTA	National Union Tanganyika Workers
Nz	New Zealand
OAU	Organisation of African Union
OCD	(Police) Officer Commanding District
op. cit	<i>opere citato</i> (in the work mentioned)
p.	page (pp – pages)
para	Paragraph
PCE	Permanent Commission of Enquiry
PIL	Public Interest Litigation
PRI	Penal Reform International
PSRC	Parastatal Sector Reform Commission
PW	Prosecution witness
Q.B.	Queen's Bench
R.	Rex, Regina or Republic
R.C.	Regional Commissioner
R.C.O.	Regional Crime Officer
R.E.	Revised Edition (of the Laws of Tanzania)
Rev.	Reverend
RM	Resident Magistrate
RPC	Regional Police Commander

RPO	Regional Prisons Officer
Rtd	Retired
s.	Section
S.A.	South Africa
S.C.C.	Supreme Court of Canada
S.C.R.	Supreme Court Reports (Canada and India)
s/o	Son of
SADC	Southern African Development Community
SAHRIT	Southern African Human Rights Trust
SAL	Social Action Litigation
SALC	South African Law Commission.
Shs.	Shillings (TShs. – Tanzanian Shillings)
SOSPA	Sexual Offences (Special Provisions) Act
Supp.	Supplementary (Law Reports, etc)
T.L.R.	Tanzania Law Reports
TAMWA	Tanzania Media Women Association
TANU	Tanganyika African National Union
TAWLA	Tanzania Women Lawyers Association
TAZARA	Tanzania Zambia Railway Authority
TFL	Tanzania Federation of Labour
TIC	Tanzania Investment Centre
TFNC	Tanzania Food and Nutrition Centre
TLS	Tanganyika Law Society
U.K.	United Kingdom
U.O.I.	Union of India
UDHR	Universal Declaration of Human Rights

UN	United Nations
UNGASS	United Nations General Assembly Special Session on Children
UNICEF	United Nations Children's Fund
URT	United Republic of Tanzania
US	United States of America (also USA)
US\$	United States Dollar
v.	versus (against)
V.R.	Victoria Reports
VOM	victim-offender mediation (VOM) (South Africa)
W.L.R.	Weekly Law Reports (England)
WSSD	World Summit on Sustainable Development
Z.L.R.	Zanzibar Law Reports
ZLR	Zimbabwe Law Reports

## LIST OF CASES

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*Commission Nationale des Droits de l'Homme et des Libertes v Chad* (2000)

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*Ethiopia v Eritrea*, Communication No. 233 of 1999 (AComHPR).

*Femi Falana v African Union*, Application No. 001/2011 (ACHPR).

*Free Legal Assistance Group and 3 Others v Zaire* Communication No's 25/89; 47/90; 56/91; and 100/93, Ninth Annual Activity Report: 1995-1996.

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*S v J and Others* 2000 (2) SACR 310 (C).

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*Buzwagi Project v Antony Lameck*, High Court of Tanzania (Labour Division ) at Mwanza, Revision N0. 297 of 2008 (Unreported).

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*Elizabeth Stephen & Another v A.G.*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 82 of 2005 (unreported).

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*Hassani Hatibu v R*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 71 of 2002 (Unreported).

*Hattan v R* [1969] HCD 234.

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*Lohay Akonaay and Another v the Attorney-General*, High Court of Tanzania at Arusha, Miscellaneous Civil Cause No. 1 of 1993 [unreported]).

*Marcela Barthazar v Hussein Rajab* (1986) TLR 8 (HC).

*Mkombozi Centre for Street Children & 2 Others v A.G.*, High Court of Tanzania at Arusha, Miscellaneous Civil Cause No. 24 of 2007 (Unreported).

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*Nyakulima d/o Chacha v R*, 1 T.L.R. 341.

*Paul Yustus Nchia v National Executive Secretary, CCM & Another*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 85 of 2005 (Unreported).

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*R v Fidelis John* [1988] TLR 165.

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*R v Mohamed Abdullah*, District Court of Magu, Criminal Case No. 116 of 1999.

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*Sangu Saba & Another v R* [1971] HCD no. 385.

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*21<sup>st</sup> Century Food & Packaging Ltd. v Emmanuel Mzava Kimweli*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 158 of 2008 (Unreported).

## LIST OF LEGISLATION

### **Selected Treaties and other International and Regional Documents**

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African Charter on Human and Peoples' Rights (ACHPR), adopted by the OAU in 1981 and came into force in October 1986.

African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990), opened for signature 11 July 1990, entered into force 29 November 1999.

American Convention on Human Rights, opened for signature 22 November 1969, 1144 U.N.T.S. 123, entered into force 27 August 1979.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted on 10 December 1984, G.A. res 39/46, entered into force 26 June 1987 503.

Convention on the Rights of the Child, adopted by the UN General Assembly on 20 November 1989, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 1990.

European Convention for the Protection of Human Rights and Fundamental Freedoms, Opened for signature 4 November 1950, 213 U.N.T.S. 221, entered into force 3 September 1953.

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ILO Convention on Equal Remuneration, No. 100 of 1951.

ILO Convention on Discrimination, Employment and Occupation, No. 111 of 1958.

ILO Convention on Minimum Age, No. 138 of 1973.

ILO Convention on Worst Forms of Child Labour, No. 182 of 1999.

International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force on 23 March 1976.

International Covenant on Economic, Social and Cultural Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force on 3 January 1976.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of African Court on Human and Peoples' Rights, adopted by the AU Assembly of Heads of State and Government in Ouagadougou, Burkina Faso, on 10<sup>th</sup> June 1998.

Protocol of the Court of Justice of the African Union, adopted by the AU Assembly of Heads of State and Government in Maputo, Mozambique, on 11<sup>th</sup> July 2003.

Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted by the AU Assembly of Heads of State and Government in 2004 and entered into force on 25<sup>th</sup> January 2004.

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Correctional Services Act 111 of 1998 (South Africa).

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Criminal Law Amendment Act 105 of 1997 (South Africa).

Criminal Procedure Act No 51 of 1977 (South Africa).

Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007), Act No. 32 of 2007 (South Africa).

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Youth Offenders Act, 1954 (United Kingdom) (now repealed).

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Community Service Act (Act No. 6 of 2002), Cap. 291 R.E. 2002.

Constitutional Review Act (2011), Cap. 83 R.E. 2012.

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dated 23<sup>rd</sup> Mach 2007.

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(1979).



## CHAPTER ONE

### 1.0 INTRODUCTION AND OVERVIEW OF THE STUDY

#### 1.1 Background to the Study

Until recently, children's rights the world over were viewed as 'falling within the realm of charity.'<sup>1</sup> This means that society regarded children as miniature adults,<sup>2</sup> whose legal status was 'largely based on their "needs" as opposed to their "rights."<sup>3</sup> In many situations, children were treated as "objects," with mini rights. For instance, at the family level, children were considered as "property" or "chattel" of the parents, particularly the father. At the community level, children's rights were not given any special protection, leading to the prevalence of corporal punishment and passing of capital punishments such death sentence on children.<sup>4</sup>

However, as children continued to increasingly experience unbearable abuses and exploitation, the world community realised the need to have specific legal protection mechanism for children. In the US, by the end of the 19<sup>th</sup> century many states had established a separate court system for children. In 1924, the then League of Nations adopted the Declaration of the Rights of the Child, which inspired the United Nations (UN) to adopt the Declaration of the Rights of the Child in 1959. In 1979 the African Declaration on the Rights and Welfare of the Child was adopted. In 1989, the first

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<sup>1</sup> Sloth-Nielsen, J. and B.D. Mezmur, "Surveying the Research Landscape to Promote Children's Legal Rights in an African Context." *African Human Rights Law Journal*. Vol. 7 No. 2, 2007, pp. 330-353, at pp. 330-331.

<sup>2</sup> Flekkoy, M. and N.H. Kaufman, *Rights and Responsibilities in Family and Society*. London: Jessica Kingsley Publishers, 1997, p. 15.

<sup>3</sup> Mezmur, B.D., "The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-sum-Game?" *SA Public Law*. Vol. 23, 2008, pp. 1-28. This article is also published in *The Justice Review*. Vol. 8 No. 2, 2009, pp. 18-46.

<sup>4</sup> Rios-Kohn, R., "Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries." In United Nations Children Fund (UNICEF), *Protecting the World's Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems*. New York: Cambridge University Press, 2007, pp. 34-99, p. 39.

ever binding international children's instrument – the UN Convention on the Rights of the Child (the CRC) – was adopted by the UN General Assembly, followed by the adoption of the African Charter on the Rights and Welfare of the Child (the ACRWC) in 1990.

As a positive recognition of the need for an international instrument providing adequate protection of children's rights, the CRC has been ratified by all members (193) of the UN, except the US and Somalia. This 'signals that the rights which contribute towards the protection of children have outgrown the discretionary power of the national legislators.'<sup>5</sup> With the adoption of the two principal international children's rights instruments, states around the world are increasingly domesticating the principles and standards enshrined in these instruments as well as in other international human rights instruments into municipal laws.

In this context, both Tanzania and South Africa have enacted legislation on children's rights and juvenile justice as obliged by international children's rights treaties. Whereas South Africa enacted the Children's Act in 2005<sup>6</sup> and the Child Justice Act (the CJA) in 2008<sup>7</sup>, Tanzania enacted the Law of the Child Act (the

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<sup>5</sup> Sloth-Nielsen, J. and B.D. Mezmur, op. cit, p. 331.

<sup>6</sup> Act No. 38 of 2005. According to its long title, this law seeks to give effect to the rights of children as contained in the Constitution of South Africa by setting out principles relating to the care and protection of children. It also defines parental responsibilities and rights; and makes further provision regarding children's courts and the issuing of contribution orders. It further makes new provision for the adoption of children; and provides for inter-country adoption to give effect to the Hague Convention on Inter-country Adoption. In addition, it prohibits child abduction to give effect to the Hague Convention on International Child Abduction; and provides for surrogate motherhood. The law also creates new offences relating to children.

<sup>7</sup> Act No. 75 of 2008. This law establishes a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the South African Constitution and the international obligations of the Republic of South Africa regarding the administration of juvenile justice.

LCA) in 2009<sup>8</sup>. In fact, these laws have incorporated international children's rights norms in both countries' domestic legal system.<sup>9</sup> However, South Africa has taken a more progressive incorporation of international children's rights norms than Tanzania. That is to say, whereas South Africa has adopted a separate law on child justice; Tanzania has adopted a composite law, incorporating provisions for the protection and promotion of children's rights together with those relating to children in conflict with the law. This situation has resulted in the strengthening of juvenile justice in South Africa more than in Tanzania, whereby provisions relating to juvenile justice are incorporated in only one part (i.e. Part IX), which are generally weak and not expansive enough to incorporate the entire body of international juvenile justice standards.

Coincidentally, both the CJA and the LCA came into force on 1<sup>st</sup> April 2010, making it a significant basis for undertaking a comparative study on the efficacy of these laws as regards the administration of the juvenile justice systems in these countries in the context of the international juvenile justice norms. In addition, there are other reasons that have formed the basis for undertaking a comparative study on the administration of the juvenile justice systems in these countries, as set out below.

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<sup>8</sup> Act No. 21 of 2009 (Cap. 13 R.E. 2009). This law combines provisions for child care, maintenance, child protection, custody and access as well as foster care/placement and adoption (as also set out in the South African Children's Act) as well as provisions relating to children in conflict with the law (as contained in the South African Child Justice Act). These provisions seek to domesticate international children's rights and juvenile justice standards in Tanzania.

<sup>9</sup> It should be noted that the enactment of juvenile justice-specific laws in South Africa and Tanzania has been influenced by the development in international children's rights law that emphasises the need for (a) putting in place special legal protection of children in conflict with the law at the domestic level; and (b) establishing separate institutions, systems and procedures for dealing with children in conflict with the law.

First, both countries follow the common law system, whereby South Africa blends the common law system with a mixed Roman-Dutch system.<sup>10</sup> This means that the countries have a similar approach to domesticating international instruments<sup>11</sup> as well as enacting, implementing, interpreting and applying laws. Second, whereas South Africa has specifically constitutionalised children's rights (particularly in Section 28 of the 1996 Constitution), Tanzania has yet to do so. Therefore, the South African approach in constitutionalising children rights can also be replicated in the envisaged Tanzanian new constitution.

Third, with Tanzania playing a leading role in "democratising" South Africa from the 1960s to 1990s, both countries have a high rate of crimes, with South Africa being amongst the leading countries in the world.<sup>12</sup> In both countries, crimes continue to threaten the personal safety, socio-emotional health and economic growth of their

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<sup>10</sup> See particularly African Child Policy Forum, *Harmonisation of Children's Laws in Eastern and Southern Africa: Country Briefs*. Addis Ababa: African Child Policy Forum, 2012.

<sup>11</sup> Both countries adopt the dualist approach to domesticating international instruments, which requires that such treaties can only be incorporated into national law by domestic statute. See particularly Odongo, G.O., "The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context." LL.D. Thesis, University of Western Cape, 2005; and Africa Wide Movement for Children, *An Africa Fit for Children: Progress and Challenges*. Kampala: Africa Wide Movement for Children, 2012.

<sup>12</sup> Globally, South Africa ranks 7<sup>th</sup> on the list of the world's top ten countries with highest reported crimes rates. These countries are ranked as follows: US (11,877,218); United Kingdom (6,523,706); Germany (6,507,394); France (3,771,85); Russia (2,952,370); Japan (2,853,739); South Africa (2,683,849); Canada (2,516,918); Italy (2,231,550); and India (1,764,630). This data derive from a web-based crime rates map that shows the world top ten countries with the highest reported crime rates. The map indicates the number of crimes that took place per 100,000 people and its indicates that South Africa is the only African country in the top ten list. The map is available on [www.mapsofworld.com/world-top-ten/countries-with-highest-reported-crime-rates.html](http://www.mapsofworld.com/world-top-ten/countries-with-highest-reported-crime-rates.html) (accessed 11 February 2013). For a detailed analysis of the crime rates and their causes in South Africa, see for instance, Steyn, F., *Review of South African Innovations in Diversion and Reintegration of Youth at Risk*. Claremont: Open Society Foundation for South Africa, 2005; Dissel, A., "Youth, Crime and Criminal Justice in South Africa." *The World Bank Legal Review: Law, Equity and Development*. Vol. 2, 2006, pp. 236-261; and Legal and Human Rights Centre, *The State of Juvenile Justice in Tanzania*. Dar es Salaam: Legal and Human Rights Centre, 2003.

citizens, particularly those living in poor and criminogenic environments (i.e., environment conducive to crime).<sup>13</sup>

Fourth, in both countries children and youth are in the particularly vulnerable group, both as victims and perpetrators of crime. In South Africa, for instance, it is estimated that 3,593 children under the age of 18 were in prison as at 31<sup>st</sup> May 2004, while 1,868 were awaiting trial and 1,725 were serving sentences.<sup>14</sup> The numbers of children in prison in South Africa dropped to 536 in March 2011. This figure was 658 in 2010 and 973 in 2006.<sup>15</sup> With regard to the actual number of children processed through the juvenile justice system in South Africa, Sloth-Nielsen and Gallinetti point out that:

It is to be noted that there is no clear benchmark of how many children are expected to be channelled through child justice processes annually. Various guesstimates have been proffered, the most well known being around 100 000 children arrested per annum. ... The baseline study of the Child Justice Alliance (2007) gives an indication of the very wide range of non-serious or ordinary offences for which children appear in courts on a day to day basis.<sup>16</sup>

Although in Tanzania there is no official record regarding the actual number of children in imprisonment and those awaiting trial,<sup>17</sup> there is sufficient information

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<sup>13</sup> Steyn, *ibid.*, p. 1.

<sup>14</sup> Sloth-Nielsen, J., "What does the New Correctional Services Act say About Children in Prison?" *Article 40*. Vol. 3 No. 3, 2004.

<sup>15</sup> Waterhouse, S., "Parliament Reviews the Implementation of the Child Justice Act" *Article 40*. Vol. 13 No. 2, September 2011. See also Department of Justice and Constitutional Development, *Annual Report on the Implementation of the Child Justice Act, 2008*. (Act No. 75 of 2008), 2011, p. 26.

<sup>16</sup> Sloth-Nielsen and J. Gallinetti, "'Just Say Sorry?' *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008." *P.E.R.*, Vol. 14 No. 4, 2011, pp. 63-90, p. 84 (note 52). See also Gallinetti, J. and D. Kassan, *Research on the Criminal Justice System Pertaining to Children in Three Magisterial Districts*. Cape Town: Child Justice Alliance, 2007.

<sup>17</sup> According to official Government information, 'without information about the total number of juveniles who were detained, it is difficult to know whether this represents improvement, or that more juveniles are being detained in facilities with adults.' See Research and Analysis Working Group, *Poverty and Human Development Report 2007*. Dar es Salaam: MKUKUTA Monitoring System/Ministry of Planning, Economy and Empowerment, 2007, p. 68. See also Mashamba, C.J.,

pointing to the high prevalent rate of child offending in the country.<sup>18</sup> According to disaggregated statistical data available, between 2003 and 2005 there were 281 offending children arrested by the police, 427 charged and sentenced, and 844 kept in pre-trial detentions in Tanzania.<sup>19</sup> Even data from recent studies by the Commission for Human Rights and Good Governance (CHRAGG) and the Ministry of Constitutional and Legal Affairs (MoCLA) have not been able to establish the exact number of children processed through the criminal justice annually.

In early 2011 CHRAGG conducted a comprehensive survey on children in detention in Tanzania.<sup>20</sup> In carrying out this study, CHRAGG undertook inspection visits to 65 detention centres around the country where children are held, including 30 prisons, 29 police stations, then 5 Retention Homes<sup>21</sup> and the one Approved School. CHRAGG's report focused on conditions and treatment of children in detention.<sup>22</sup> Accordingly, the CHRAGG Report revealed that there were 1400 children in adult

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“Overview of the Implementation of Cluster III of MKUKUTA: Governance and Accountability.” *The Justice Review*. Vol. 5 No. 5, 2007, pp. 19-23, p. 22.

<sup>18</sup> See Legal and Human Rights Centre, op. cit. See also Mashamba, C.J., “A Child in Conflict with the Law under the Tanzanian Law of the Child Act (2009): Accused or Victim of Circumstances?” *The Justice Review*. Vol.8 No. 2, 2009, pp. 156-209.

<sup>19</sup> These data are reported in United Republic Of Tanzania, “Consideration of the Second Periodic CRC Report: 1998-2003,” answers to questions raised for additional and updated information considered in connection with the 2<sup>nd</sup> CRC report to the UN Committee on the Rights of the Child on 15<sup>th</sup> -19<sup>th</sup> May 2006.

<sup>20</sup> Under Section 6 (1) (h) of the Commission for Human Rights and Good Governance Act, No. 7 of 2001, CHRAGG has the mandate to visit prisons and places of detention or related facilities to assess and inspect conditions of persons held in detention.

<sup>21</sup> By the end of 2012 there were established 7 Retention Homes under Section 133(9) of the Law of the Child Act. As per the First Schedule to the Law of the Child (Retention Homes) Rules (2012) GN. No. 151, the existing Retention Homes are located in Arusha, Dar es Salaam, Mbeya, Moshi, Mtwara, Mwanza and Tanga Regions. However, the Mtwara and Mwanza Retention Homes are yet to be operational.

<sup>22</sup> United Republic of Tanzania, “Inspection Report for Children in Detention Facilities in Tanzania”. Dar es Salaam, Commission for Human Rights and Good Governance, June 2011 (herein after referred to as “The CHRAGG Report”).

prisons and detention facilities in the country.<sup>23</sup> In April 2011, MoCLA convened the Child Justice Forum<sup>24</sup>, which culminated in the undertaking of two comprehensive studies: an assessment of the access to justice system for under-18s, and an assessment of the juvenile justice system.<sup>25</sup> The scope and execution of the studies was overseen and guided by the Child Justice Forum, under MoCLA in collaboration with UNICEF (Tanzania Country Office). Relevant to this study is the assessment of juvenile justice system, whereby data was collected through a series of semi-standardised interviews and focus group discussions with juvenile justice professionals, including Police Officers (at all levels); Prosecutors (State Attorneys and Police Prosecutors), Magistrates, defence lawyers, Retention Home staff, Approved School staff, staff in adult prisons, Social Welfare Officers, Ward Tribunal members and staff at relevant CSOs and NGOs. In total, 96 professionals were interviewed across the 10 research regions. A total of 192 children in conflict with the law were also interviewed across the 10 research regions. The majority of these children (170) were interviewed on a one-to-one basis, and the rest were interviewed in three focus group discussions.<sup>26</sup>

Fifth, the two countries have nonetheless distinct approaches to legally addressing the ever-increasing problem of child offending. In South Africa, already there is a Child Justice Act, which was first tabled in Parliament in August 2002, aiming at

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<sup>23</sup> Ibid.

<sup>24</sup> This is an inter-agency forum comprised of key national state and non-state actors mandated to develop recommendations and strategy for reform of the child justice system.

<sup>25</sup> The Children's Legal Centre (a UK-based NGO) and the National Organisation for Legal Assistance (a Tanzanian NGO) were commissioned to undertake these studies. The researcher was one of researchers in the assessments.

<sup>26</sup> United Republic of Tanzania, "An Analysis of the Situation for Children in Conflict with the Law in Tanzania." Dar es Salaam, Ministry of Constitutional and Legal Affairs (MoCLA)/UNICEF, July 2011.

protecting the rights of children accused of committing crimes and managing their progress through the criminal justice system.<sup>27</sup> In Tanzania, on the other hand, the law reform of the legislation concerning children accused of committing crimes has taken a very long time to be completed.<sup>28</sup> The law reform process in Tanzania began in 1988 when the Law Reform Commission of Tanzania (LRCT) was commissioned by the Government to undertake legal research on legislations concerning, *inter alia*, children's rights in the country. It submitted its report to the minister responsible for justice in 1994 recommending the "overhaul" of the entire children law regime because all the laws were outdated,<sup>29</sup> but since then nothing was done in respect of legislating for juvenile justice,<sup>30</sup> until November 2009 when Parliament passed the Law of the Child Act (2009).<sup>31</sup>

In fact, the law review process undertaken by the LRCT coincided with landmark developments in the area of children's rights at the international arena. In 1989 the United Nations (UN) General Assembly passed the CRC, which Tanzania signed and ratified by June 1991. Similarly, in 1990 the then Organization of African Union (OAU, now the African Union [AU]) passed the ACRWC, which Tanzania ratified

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<sup>27</sup> Steyn, F. Op. cit., p. 1; and Dissel, A., "Youth, Crime and Criminal Justice in South Africa", op. cit, pp. 249-254.

<sup>28</sup> Mashamba, C.J., "Accepting the Necessary Evil: The Need for a new Statute Promoting and Protecting Children's Rights in Tanzania." *The Justice Review*. Vol. 5 No. 5, 2007, pp. 11-15.

<sup>29</sup> Amongst the outdated laws include the repealed Children and Young Persons Ordinance, Cap. 13 of 1937 [later, the Children and Young Persons Act, Cap. 13 R.E. 2002]. See also United Republic of Tanzania, *Report of the Commission on the Law Relating to the Children in Tanzania*. Dar es Salaam: Government Printer, 1996.

<sup>30</sup> For a detailed account on the children's rights law reform in Tanzania, see particularly, United Republic of Tanzania, *ibid*.

<sup>31</sup> For a comprehensive account of Tanzania's legislative efforts on this law, see particularly Mashamba, C.J. and K.L. Gamaya. "The Enactment of the Tanzanian Law of the Child Act (2009): Some Lessons Learnt from CSOs' Participation in the Lawmaking Process." *The Justice Review*. Vol. 8 No. 2, 2009; and Mashamba, C.J., "Domestication of International Children's Rights Norms in Tanzania." *The Justice Review*. Vol. 8 No. 2, 2009.



in February 2003. Indeed, Tanzania ratified these international instruments on children rights without any reservations, meaning that it ‘has undertaken to bring her domestic legislation in line with all the provisions of (these international instruments on the rights of the child).’<sup>32</sup>

In principle – as well as per the constant recommendations and reminder of the UN Committee on the Rights of the Child (the CRC Committee) – it is an essential aspect of States Parties thereto, while implementing the CRC, to ensure that all domestic legislation is “fully compatible” with the provisions and principles of the CRC.<sup>33</sup> In respect of Tanzania, the CRC Committee, in its Concluding Observations in respect of the country’s initial report (1998) and the second periodic report (1998-2003), was concerned ‘at the lack of a clear time frame (for Tanzania) to finalize the consultative process and enact “The Children’s Act.”’<sup>34</sup>

It should be noted that, in its second periodic report to the CRC Committee (1998-2003), Tanzania reported that it was undertaking legislative review and collecting views of stakeholders, including children, through the national ‘White Paper.’<sup>35</sup> It

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<sup>32</sup> See Mashamba, C.J., “Basic Principles to be Incorporated in the New Children Statute in Tanzania.” In Mashamba, C.J. (ed.), *Using the Law to Protect Children’s Rights in Tanzania: An Unfinished Business*. Dar es Salaam: National Organization for Legal Assistance, 2004, p. 107.

<sup>33</sup> See Mashamba, C.J., “Accepting the Necessary Evil: The Need for a new Statute Promoting and Protecting Children’s Rights in Tanzania”, op. cit. See also Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*. 3<sup>rd</sup> edn. Geneva: United Nations Children Fund (UNICEF), 2007.

<sup>34</sup> See UN CRC Committee, “Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,” CRC/C/TZA/CO/2, dated 2<sup>nd</sup> June, 2006, para 9.

<sup>35</sup> Mashamba, C.J., “Accepting the Necessary Evil: The Need for a new Statute Promoting and Protecting Children’s Rights in Tanzania”, op. cit.

was reported that the National White Paper would engender “The Children’s Act.”<sup>36</sup> Nevertheless, the CRC Committee urged Tanzania to ‘engage all efforts and resources necessary for the enactment of the Children’s Act in Tanzania Mainland and a similar Act in Zanzibar, as a matter of priority. It further [urged Tanzania] to ensure that all of its domestic and customary legislation [should] conform fully to the principles and provisions of the Convention, and ensure its effective implementation.’<sup>37</sup>

This Chapter, therefore, lays down the foundation of this study. It sets out the reasons for undertaking this comparative study on the administration of the juvenile justice systems in Tanzania and South Africa. It also sets out the background to, and statement of, the problem under research. The Chapter further lays down the objectives, scope, justification, hypotheses and methodologies of this study.

## **1.2 Statement of the Problem**

The thrust of this thesis is that, unlike South Africa, Tanzania is far behind in its domestication and implementation of international juvenile justice standards in the light of the CRC and ACRWC. In order to be able to carry out a critical assessment on the administration of juvenile justice in Tanzania, this thesis looks at the issue as

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<sup>36</sup> See United Republic Of Tanzania, “The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003,” Ministry of Community Development, Gender and Children; August, 2004. See also United Republic Of Tanzania, “Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15<sup>th</sup>-19<sup>th</sup> May, 2006, in Geneva, Switzerland,” Ministry of Community Development, Gender and Children; April 2006.

<sup>37</sup> See UN CRC Committee, “Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania”, op. cit, para 10.

to whether or not Tanzania has effectively domesticated international juvenile justice standards in comparison with South Africa. This is grounded in the fact that, over the past two decades since the CRC and ACRWC were adopted, States Parties to these international treaties have committed themselves to domesticating the juvenile justice standards enshrined therein.<sup>38</sup> As UNICEF notes, the monitoring of the domestication and implementation of these instruments at the domestic level shows that ‘the rights, norms and principles involved are regularly ignored and seriously violated virtually throughout the world ... on a scale ... unmatched in the field of [human] rights implementation’.<sup>39</sup> Tanzania is no exception to this reality; and, therefore, this study attempts to address the issue of the extent to which the provisions of the CRC and the ACRWC relating to the administration (and functioning) of an effective juvenile justice system have been domesticated in Tanzania as compared to South Africa.

Appreciating the relevance of the CRC and the ACRWC in the administration of juvenile justice, specific laws and provisions protecting the rights of children in conflict with the law have recently been enacted in both South Africa and Tanzania. However, the study shall demonstrate how Tanzania took a slow pace to commence the legislative review process and the impact of lack of wide and effective consultation of stakeholders in this process. It is to be noted that, as a result lack of wide and an effective consultation, the Tanzanian child law contains several gaps, which may negatively impact on the administration of juvenile justice. As such, this

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<sup>38</sup> Odongo, G.O., “The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context”, op. cit, p. 6.

<sup>39</sup> UNICEF, *Innocenti Digest No. 3 on Juvenile Justice*. Florence: UNICEF, 1998, p. 2.

thesis will examine these gaps and the extent to which they positively or negatively impact on the administration of juvenile justice in Tanzania.

Since the LCA became operational on 1<sup>st</sup> April 2010, Tanzania still has only one Juvenile Court at Kisutu in Dar es Salaam<sup>40</sup> and no other courts have, so far, been designated as Juvenile Courts as required under the LCA.<sup>41</sup> There are also only 5 functioning, but poorly equipped, Retention Homes in the country<sup>42</sup>, with two additional ones being recently established in Mtwara and Mwanza Regions<sup>43</sup>, but are yet to become functional. As such, this thesis examines the implications of having only one Juvenile Court and only five functioning Retention Homes for the entire country; particularly, in the light of the requirement under the CRC and ACRWC that States Parties thereto have an obligation to establish separate laws, processes, procedures, structures and institutions/personnel for dealing with children in conflict with the law.

This thesis focuses particularly on juvenile justice rights and norms set out in the CRC and the ACRWC; principally because of the neglect by States around the world of their responsibilities in this regard.<sup>44</sup> In Tanzania the administration of juvenile

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<sup>40</sup> Juvenile Courts are established under Section 97(1) of the LCA.

<sup>41</sup> Section 97(2) of the LCA empowers the Chief Justice, by notice in the *Gazette*, to designate any premises used by a primary court to be a Juvenile Court.

<sup>42</sup> The functioning Retention Homes are located in Arusha, Dar es Salaam, Mbeya, Kilimanjaro and Tanga Regions. However, the Mtwara and Mwanza Retention Homes are yet to be operational.

<sup>43</sup> Established 7 Retention Homes under Section 133(9) of the Law of the Child Act. See also First Schedule to the Law of the Child (Retention Homes) Rules (2012) GN. No. 151.

<sup>44</sup> Some authors have described a child in conflict with the law the “unwanted child” of States’ responsibilities. See particularly Defence for Children International, *Juvenile Justice: the Unwanted Child of State Responsibilities*. Geneva: Defence for Children International, 2001, p. 1. As Odongo points out, in many countries, ‘young people in the juvenile justice system are generally viewed only in the narrow perspective as law breakers and a threat to the public. The fuller picture is not seen of

justice has been identified as unsatisfactory in various respects.<sup>45</sup> According to a report by the Law Reform Commission of Tanzania (LRCT), the colonially-inherited juvenile penal law<sup>46</sup> had been intended to deal with ‘many problems of street children (both delinquent and non delinquent)’ prevalent in the colonial era. However, ‘the methods of dealing with the said two categories of children (were/are) mixed up,’ with sheer lack of clear provisions in the law on how best to deal with both categories.<sup>47</sup> Nonetheless, the LCA has not been able to get rid of this anomaly. Therefore, this thesis examines the ramifications of this problem on the effective administration of juvenile justice in Tanzania in the context of the standards set out in the CRC and ACWRC and borrowing a leaf from the South African experience, which has comprehensively reformed its child justice law.

In order to have a clear understanding of the realistic approach to improving domestic law and practice relating to the administration of juvenile justice in Tanzania, the thesis comparatively examines the process of reforming the child justice legislation in South Africa, which took a wider consultative approach as opposed to the Tanzanian case. Indeed, South Africa ratified the CRC in 1995, and subsequently adopted the 1996 Constitution, which includes a special provision guaranteeing the rights of children accused of committing crimes. It should be noted that the Tanzanian Constitution does not have specific child rights or child justice provisions. At the same time, there are adequate initiatives aimed at diverting young

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children who are in need of understanding and assistance and who themselves are often victims of violence and social injustice.’ Odongo, G.O., “The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context”, op. cit, p. 8.

<sup>45</sup> See United Republic of Tanzania, *The Law Relating to Children in Tanzania*, op. cit.

<sup>46</sup> The Children and Young Persons Act, Cap. 13 R.E. 2002, was repealed by the LCA in 2009.

<sup>47</sup> Ibid.

offenders in South Africa<sup>48</sup> as opposed to Tanzania where there do not exist any of such initiatives. Even before the Child Justice Act was enacted in 2008 there was an estimated number of 18,000 children being diverted from the criminal justice system annually in South Africa. This number was thence expected to increase dramatically with the enactment of the Child Justice Act.<sup>49</sup> The thesis will, therefore, investigate the efficacy of these diversion measures in South Africa and how Tanzania can emulate and domesticate some of these measures to ensure that children in Tanzania are also diverted from the criminal justice process as soon as they come into contact with the law.

So, against this background to the problem surrounding this study, the thesis critically examines the extent to which the just-enacted juvenile justice laws in Tanzania and South Africa comply with the international juvenile justice standards enshrined in the CRC, the ACRWC and other international human rights instruments, taking into account the practical circumstances prevalent in the two countries under study. In particular, the thesis attempts to investigate the reasons forming the basis for Tanzania's non-compliance with its international obligation to effectively domesticate and implement international juvenile justice norms in its juvenile justice system, with a view to charting out feasible recommendations for further reform(s) and improvement of the Tanzanian juvenile justice law.

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<sup>48</sup> Steyn, F., *Review of South African Innovations in Diversion and Reintegration of Youth at Risk*, op. cit.

<sup>49</sup> Muntingh, L., "Personal Correspondence between Louise Ehlers (OSF-SA) and Lukas Muntingh (NICRO), quoted in Steyn, *ibid*, p. 1.

### **1.3 Justification of the Study**

This study is expected to form part of a working document for advocacy for further law reform and enforcement of legislation relating to juvenile justice in Tanzania, as there is no any extensive scholarly work produced on this area of legal knowledge in the country. As such, being a member of an NGO working in the areas of human rights as well as juvenile justice in Tanzania, and having played a leading role in the CSOs' lobbying for the enactment of the Law of the Child Act (2009), the researcher intends to use the findings of this study in the formulation of new initiatives in the administration of juvenile justice, particularly diversion of young offenders from the criminal justice system in Tanzania. So, the output of this study is expected to be two-thronged: first, it will serve as an advocacy tool for further reform and enforcement of legislation concerning juvenile justice in Tanzania; and, secondly, it will contribute immensely to the existing knowledge on juvenile justice not only in Tanzania but in Africa as a whole.

### **1.4 Objectives of the Study**

This study has strived:

- (i) To make a comparative analysis of the experiences between South Africa and Tanzania in dealing with the problems and challenges encountered in the administration of juvenile justice with a view to bringing forth lessons that Tanzania can learn and emulate in its endeavour to improve the administration of juvenile justice;

- (ii) To comparatively assess the efficacy of the juvenile justice laws put in place in Tanzania and South African in accordance with their international obligations; and
- (iii) To recommend better approaches for improving administration of the juvenile justice system in Tanzania, with a view to effectively protecting the rights and welfare of children in conflict with the law in the context of International Children's Rights Law.

## **1.5 Hypotheses**

This study tested the following hypotheses:

- (i) Both in Tanzania and South Africa, efforts have recently been made to enact laws for the protection of children in conflict in line with their international obligations, but in Tanzania the law is not adequate and yet to be effectively implemented;
- (ii) The Law of the Child Act (2009) has placed enormous roles, power and obligations in the hands of Social Welfare Officers, Police Officers and Magistrates in the administration of juvenile justice, but they are not specifically trained in this field as well as they are inadequate in number to be able to effectively administer the juvenile system in Tanzania, which makes it distinguishable from the South African experience;
- (iii) Unlike the South African Child Justice Act, the juvenile justice system under the Law of the Child Act (2009) in Tanzania does not expressly favour diversion of offending children away from the criminal justice



system at all levels of the administration of juvenile justice; consequent to which, children accused of offending criminal law in Tanzania are dealt with together with, and/or in similar manner as, adult offenders at all stages of the criminal justice system; and

- (iv) Children deprived of their liberty in Tanzania do suffer a number of inhuman and degrading treatments while in detention either in police custody or in the prisons awaiting trial or “serving their prison terms.”

## **1.6 Literature Review**

Unlike in South Africa, in Tanzania there is a dearth of literature on children’s rights generally and juvenile justice in particular. As Julia Sloth-Nielsen and Benyam Mezmur points out, this is a similar situation in most of Sub-Saharan African countries.<sup>50</sup> This is notwithstanding the fact that the CRC and the ACRWC are now regarded as popular in Africa, as elsewhere in the world, which would otherwise suggest ‘a high level of normative consensus among the various nations of the world (particularly in Africa) on the idea and content of children’s rights as human rights.’<sup>51</sup> The situation is, however, different in South Africa, where standards and normative principles enshrined in the CRC and ACRWC have been enshrined in the 1996 Constitution. The Constitution contains several provisions giving domestic application to international children’s rights standards. As Saine contends, the South African Constitution includes provisions protecting children’s rights, which include the guarantee that children have the right not to be detained except as a measure of

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<sup>50</sup> Sloth-Nielsen, J. and B.D. Mezmur, op. cit.

<sup>51</sup> Ibid.

last resort and then for the shortest appropriate period of time, separate from adults and in conditions that take account of his her age.<sup>52</sup>

This reality in South Africa is made true because ‘one of the proactive elements that make the South African Constitution progressive is its *express* reference to the guarantees and protection of ... children’s rights, as lucidly contained [for example] in Section 28 of the 1996 Constitution.’<sup>53</sup> According to Julia Sloth-Nielsen, this element, together with South Africa’s ratification of the CRC,<sup>54</sup> has ‘provided the impetus for redrafting legislation affecting children, to get effect to constitutional and international law commitment.’<sup>55</sup>

Discussing the import of Section 35 of the Constitution of South Africa – which provides for the basic due process rights<sup>56</sup> in the criminal justice system right from the arrest stage to the sentencing stage – De Waal, et al, point out that although these due process rights in the Constitution do not seek to replace the statutory and common law principles governing the administration of criminal justice,<sup>57</sup> ‘the latter must comply with the provisions of the Bill of Rights and the rest of the [South African] Constitution.’<sup>58</sup>

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<sup>52</sup> Saine, M., “Protecting the Rights of Children in Trouble with the Law: A Case Study of South Africa and The Gambia.” LL.M. Thesis, University of Pretoria, 2005, p. 21.

<sup>53</sup> Mashamba, C.J., “Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights.” LL.M. Thesis, Open University of Tanzania, 2007.

<sup>54</sup> South Africa ratified the CRC in 1995.

<sup>55</sup> Sloth-Nielsen, J., “Promoting Children’s Socio-economic Rights through Law Reform: the Proposed Children’s Bill.” *ESR Review* Vol. 4, No. 2, June 2003, p. 2.

<sup>56</sup> For instance, it provides that child deprived of his or her liberty must be released from detention if the interest of justice so permits, but subject to reasonable conditions. *See* Section 35(1)(f) of the Constitution of South Africa (1996).

<sup>57</sup> De Waal, J. et al, *The Bill of Rights Handbook*. Cape Town: Juta & Co. Ltd., 2001, p. 585.

<sup>58</sup> Saine, op. cit, p. 26.

According to Sloth-Nielsen, though, the lack of adequate literature on juvenile justice in Sub-Saharan Africa could be attributed to the fact that many of these countries, including Tanzania, are now embarking on reform programmes aimed at aligning their juvenile penal laws along the international standards set out, *inter alia*, in the CRC and the ACRWC.<sup>59</sup> According to Sloth-Nielsen and Mezmur, the law reform in most Sub-Saharan African countries has taken a slightly similar direction where most of them have adopted an approach where juvenile justice has been (is being proposed to be) included in comprehensive child law enactments.<sup>60</sup> Indeed, this has already happened in Kenya, Lesotho, Nigeria, Tanzania and Uganda, to mention but few cases. On the other hand, other Sub-Saharan African countries have resorted to separating the juvenile laws from the comprehensive child law enactments, like Ghana, Mozambique and South Africa, The Gambia.<sup>61</sup> One thing to note in these law reform initiatives in Africa, though, is the fact that both approaches to legislating for children's rights have tended to incorporate standards in the CRC and the ACRWC. As Odongo argues, the adoption of the CRC and the ACRWC has revolutionised 'the area of child law in all its facets with a clear move from the doctrine of *parens patriae* which, by and large, entrusted parents with rights (rather than responsibilities) over their children.'<sup>62</sup> This reality has been reflected in a number of

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<sup>59</sup> Sloth-Nielsen, J., "Strengthening the Promotion, Protection and Fulfillment of Children's Rights in African Context." In Alen, A., et al (eds.), *The UN Children's Rights Convention: Theory Meets Practice*. 2007, p. 103.

<sup>60</sup> Sloth-Nielsen, J. and B.D. Mezmur, op. cit, pp. 332-337.

<sup>61</sup> Ibid.

<sup>62</sup> Odongo, G.O., "The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context." In Sloth-Nielsen, J. (ed.), *Children's Rights on Africa: A Legal Perspective*. Hampshire: Ashgate Publishing Limited, 2008, pp. 147-164, p. 147.

child laws, including those specifically on child justice, which have been enacted from 1990s to date.<sup>63</sup>

Nonetheless, at the international level it is settled that the areas of children's rights, in general, and juvenile justice, in particular, have received as wider research activities as other human rights fields. According to Manfred Nowak in his work entitled: *Introduction to the International Human Rights Regime*, children, themselves being human beings, are entitled to all human rights and freedoms.<sup>64</sup> To him, and indeed to all human rights jurists such as Rios-Kohn,<sup>65</sup> it was basing on this point of view that the world community decided as early as in 1924<sup>66</sup> and later in 1959<sup>67</sup> to adopt specific international children's rights instruments.<sup>68</sup> These early initiatives, indeed, culminated in the adoption of the CRC at the global level and the ACRWC at the African regional level.

As Mezmur points out, the CRC 'represents a very comprehensive compilation of child-specific rights.'<sup>69</sup> According to him, the CRC consists of both civil and political rights on the one hand, and economic, social and cultural rights on the

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<sup>63</sup> See, for instance, Uganda's Children Statute (1996), Kenya's Children's Act (2004), South Africa's Children Act (2005) and Child Justice Act (2008), and Tanzania's Law of the Child Act (2009).

<sup>64</sup> Nowak, M., *Introduction to the International Human Rights Regime*. Leiden/Boston: Martinus Nijhoff Publishers, 2003, pp. 91-94.

<sup>65</sup> Rios-Kohn, R., "Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries", op. cit.

<sup>66</sup> In this year, the defunct League of Nations passed the Geneva Declaration on the Rights of the Child.

<sup>67</sup> In this year, the United Nations passed its own version of the Declaration on the Rights of the Child.

<sup>68</sup> Nowak, op. cit, p. 91.

<sup>69</sup> Mezmur, B.D., "The African Children's Charter versus the UN Convention on the Rights of the Child: A Zero-sum-Game?", op. cit, p. 20.

other.<sup>70</sup> As Chirwa opines, although the CRC codifies all these categories of human rights, in Article 4 it ‘nods in favour of the views of opponents of economic, social and cultural rights.’<sup>71</sup> In Chirwa’s opinion, among such views ‘are that economic, social and cultural rights engender positive obligations; are cost extensive and can therefore only be realised progressively.’<sup>72</sup> However, Chirwa points out that, such views have lost ground in contemporary times, because: ‘It is now accepted that economic, social and cultural rights entail negative obligations and therefore can be enforced immediately.’<sup>73</sup> In order to avoid this kind of ideological differences the two categories of rights impliedly brought about by the CRC, Chirwa argues, the ACRWC has refrained from such controversial categorisation.

On her part, Rios-Kohn in her work entitled: “A Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries,”<sup>74</sup> assesses the impact of the CRC on law review and reform in selected countries of the Commonwealth Caribbean that apply the common law tradition. She opines that until the seventeenth century, children’s rights were not recognised under the common law.

Interestingly, Africa is the only continent in the world with a specific regional instrument for the protection of children’s rights and welfare, including those

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<sup>70</sup> See Article 4 of the CRC.

<sup>71</sup> Chirwa, D.M., “The Merits and Demerits of the African Charter on the Rights and Welfare of the Child.” *The International Journal of Children Rights*. Vol. 10, 2002, pp. 157-177, p. 158.

<sup>72</sup> Ibid.

<sup>73</sup> Ibid.

<sup>74</sup> Rios-Kohn, R., “Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries”, op. cit, p. 39.

children in conflict with the law. As Lloyd points out, the African regional system for the protection of children's rights is the 'most progressive achievement of all regional systems, as it is the only system to provide for a comprehensive mechanism for the protection and promotion of children's rights at a regional level.'<sup>75</sup> In her considered view, this system 'serves as an innovation in the arena of children's rights.'<sup>76</sup> To her, the ACRWC 'explicitly recognises that the child in Africa occupies a unique and privileged position in African society and that for the full harmonious development of the child's personality, the child should grow up in a family environment in an atmosphere of happiness, love and understanding (Preamble of the ACRWC).'<sup>77</sup>

In principle, the ACRWC complements the CRC in the context of the UN's recognition of regional arrangements for the protection of human rights made at its 92<sup>nd</sup> Plenary Meeting in December 1992. At this meeting, the UN General Assembly reaffirmed that: 'regional arrangements for the promotion and protection of human rights may make a major contribution to the effective enjoyment of human rights ...'<sup>78</sup> This was re-echoed one year later at the 1993 Vienna World Conference on Human Rights, which also reaffirmed 'the fundamental role that regional and sub-regional arrangements can play in promoting and protecting human rights and

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<sup>75</sup> Lloyd, A., "The African Regional System for the Protection of Children's Rights." In Sloth-Nielsen, J. (ed.), *Children's Rights in Africa: A Legal Perspective*. Hampshire: Ashgate Publishing Limited, 2008, pp. 52-84, p. 52.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid, p. 56.

<sup>78</sup> See UN General Assembly Resolution A/RES/47/125.

stressed that such arrangements should reinforce universal human rights standards as contained in international human rights instruments.<sup>79</sup>

Although the ACRWC complements the CRC, in its early years it failed to garner support from African countries as was the case with the latter. As Mezmur contends, it took nine years, for instance, ‘to get 15 countries to ratify the ACRWC and so bring the Convention (sic) into force.’<sup>80</sup> Twenty years after its adoption, up until now the ratification rate is 45 countries. All in all, as Chirwa points out, the ACRWC offers a very comprehensive space where a number of basic principles and standards on which a juvenile justice system should be based. In this regard,

The Charter breaks new ground for the protection of children’s rights [in the juvenile justice system] in three respects. First, the Charter requires that a criminal case against a child must be determined “as speedily and possible”.<sup>81</sup> This entails a pace that is over and above that applicable to adults.<sup>82</sup> Secondly, the Charter expressly provides that rehabilitation of the child must be the essential aim of treatment of the child during trial and after conviction. This provision does not come out clearly in the CRC. The Charter is therefore more progressive as it strengthens the argument of some leading scholars in international law who contend that rehabilitation is a right of every prisoner. Thirdly, the Charter guarantees every child the right to be afforded legal and appropriate assistance in the preparation and presentation of his defence. This formulation is not qualified in any way and finds no comparison in any other human rights instrument ...<sup>83</sup>

However, Chirwa finds a number of weaknesses with the ACRWC, including its lack of clear enumeration of alternative ways – i.e. diversion measures – of dealing with juveniles who comes into contact with the penal law. Chirwa also points out that the

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<sup>79</sup> Mezmur, op. cit, p. 22.

<sup>80</sup> Ibid, pp. 22-23.

<sup>81</sup> See Article 17(2)(c)(iv) of the ACRWC. To the contrary, Article 40(2)(b)(iii) of the CRC uses the phrase “without delay”. In Chirwa’s view, “as soon as possible is much stronger” than “without delay.”

<sup>82</sup> The Human Rights Committee has stated that the duty to bring a juvenile “as speedily as possible” for adjudication is an unconditional duty on State Parties and not dependent on the State Parties resources. See CCPR/C/21/Add: 1. See van Bueren, G., *The International Law on the Rights of the Child*. Dordrecht: Martin Nijhoff, 1995, pp. 175 and 180.

<sup>83</sup> Chirwa, op. cit, pp. 166-167.

ACRWC is retrogressive in that it does not contain all rights ‘surrounding the administration of [juvenile] justice, especially those in the ICCPR, e.g., the right against self-incrimination and retrospective criminal laws and punishment, and the right for child victims to be compensated for miscarriage of justice.’<sup>84</sup>

In order make sure that the basic standards and principles enshrined in the international children’s rights instruments are fully realised at the domestic level, there is an international obligation imposed on States Parties to the CRC and the ACRWC for domestication of these instruments. In most common law countries, like Tanzania, the domestication of international instruments is done through legislative action. But, as Jonas contends, ‘while legislation has the advantage of providing an important framework for action against violations of children’s rights, it remains ineffective in detecting and addressing instances where those violations are concentrated and most hazardous.’<sup>85</sup>

So, Hodgkin and Newel<sup>86</sup> concur with Makaramba<sup>87</sup> in responding to this pessimistic view. They contend that the existence of laws providing for the promotion and protection of children’s rights is not enough if those laws do not provide adequate and lucid legal powers and institutions needed in ensuring effective realisation of the

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<sup>84</sup> Ibid, p. 167.

<sup>85</sup> Jonas, op. cit, p. 4. See also Hamad, S.H., “The CRC: Words on Paper or a Reality for Children? A Case Study of Jordan”. *International Journal of Children’s Rights*. Vol. 7 No. 3, 1999, p. 215.

<sup>86</sup> Hodgkin, R. and P. Newel, *Effective Government Structures for Children*. London: Gulbenkian Foundation, 1996, p. 40.

<sup>87</sup> Makaramba, R.V., “The Efficacy of Human Rights Protection Mechanisms in Tanzania.” In Rwehumbiza, P., et al (eds.), *Human Rights Challenges in a Developing Country: Options and Strategies - An Annual Human Rights Conference Report*. Dar es Salaam: Legal and Human Rights Centre, 2003.



rights enshrined in those laws. In this regard, there is a ‘need for the state party to an instrument to establish a national infrastructure including relevant institutions which can promote, protect and enforce rights stipulated in the instrument.’<sup>88</sup> According to the CRC Committee, such institutions may be in the form of children’s commissioners, ombudspersons, or as part of the national human rights institutions.<sup>89</sup>

In his comprehensive analysis of the administration of juvenile justice in selected African countries entitled: “The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context,”<sup>90</sup> Odongo argues that,

By becoming parties to these international treaties [CRC and ACRWC], State Parties agree to be bound by their terms and to take all political, legal and administrative steps necessary to implement the core imperatives of the treaties as encapsulated in their Articles. In effect, this means that State Parties are bound both by the procedural reporting requirement as well as the obligation to take legislative steps, among others, to ensuring that children’s rights as contained in the treaties are realized and implemented in domestic systems.<sup>91</sup>

This argument is buttressed by Odongo’s contention quoted at the beginning of this analysis to the effect that the CRC and the ACRWC have revolutionized the way societies around the world now view the rights and welfare of children coming in conflict with the law.<sup>92</sup> In fact, his contention proceeds from the thesis that contemporary juvenile justice has brought about widespread, indeed universal, appreciation that ‘children and adolescents have special needs and limited capacities

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<sup>88</sup> Jonas, op. cit.

<sup>89</sup> Williams, J., “Effective Government Structures for Children? The UK’s Four Children’s Commissioners.” *Child and Family Law Quarterly*. No. 17, 2005, p. 37.

<sup>90</sup> Odongo, G.O., “The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context”, op. cit.

<sup>91</sup> Ibid, p. 2.

<sup>92</sup> Odongo, G.O., “The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context”, op. cit, p. 147.

and hence require distinctive or at least separate treatment from adults.’<sup>93</sup> According to Odongo,

Predating the ‘child rights-centred’ approach to the issue of juvenile justice, the philosophical underpinning of the idea that children accused of committing offences should be treated differently from adults has been argued from a number of theoretical standpoints. This debate is mainly captured in views in criminology where juvenile justice theory is based on the ‘welfare model’ and the ‘justice model’. ... Suffice it to say that the debate on these theories concentrates on western criminal law systems.<sup>94</sup>

Therefore, Odongo’s thesis in this work aims at showing ‘the relevance of this debate in an African context drawing examples from a number of African countries.’<sup>95</sup> In fact, this is a point of departure in the thesis: that is to say that it acknowledges that

... children as bearers of certain minimum universally agreed standards that have now crystallized as children’s human rights, the CRC and other international norms on the rights of the child stand firmly in the theoretical justification of any issue regarding the child. The subject of juvenile justice is no exception.<sup>96</sup>

According to Odongo, most of the African countries that have embarked on reforming their child rights law, including child justice, have incorporated this view in their respective domains.<sup>97</sup> One thing that remains outstanding in this regard is the fact that, in many jurisdictions juvenile justice remains embedded in the criminal

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<sup>93</sup> See Bala, N. and R. Bromwich, “Introduction: An International Perspective on Youth Justice.” In Bala, N. *et al* (eds.), *Juvenile Justice Systems: An International Comparison of Problems and Solutions*. Toronto: Thompson, 2002, p. 3.

<sup>94</sup> Odongo, G.O., “The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context”, *op. cit.*, p. 5.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> Odongo argues that: ‘Starting with the Ugandan example of 1996, there now abound examples of legislative enactments (or Bills that await the process of enactment) in a number of African countries, including the South African Child Justice Bill, the Ghanaian Children’s Act (1998) and Juvenile Justice Act (2003), the Kenyan Children’s Act (2001), the recent Namibian Child Justice Bill (2003) and Lesotho’s Children’s Protection and Welfare Bill (2004). The contents of these pieces of legislation (and Bills) differ, including as to the issue whether child care and welfare on the one hand, and juvenile justice on the other, are included in the same legislation. Despite this diversity, the common thread in this thesis will be the premise that all the examples include the subject of juvenile justice as a fundamental part of child law reform.’ *Ibid.*, p. 6.

justice system. This is because, as Alemika argues, the criminal justice system ‘is a sub-sector of the wider legal order in society.’<sup>98</sup> It functions to prevent and resolve disputes amongst citizens, between citizens and the state, and among groups in society – i.e. socio-cultural, political, economical and governmental agencies. Within the criminal justice system there are several branches, significant to this study is the juvenile justice system.

As most scholars on juvenile justice contend, the concept and practice of juvenile justice derived from developments in the criminal justice system in the 19<sup>th</sup> century after the first juvenile court was established in Chicago, in the US, in 1899.<sup>99</sup>

Odongo, for one, points out that,

Prior to the juvenile court’s invention, the system for controlling juvenile delinquents was contained within the general criminal justice system which meted out to children or adolescents above a certain age the same criminal justice rules or procedures as adults with little or no differentiation or reduction of the applicable punishment measures.<sup>100</sup>

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<sup>98</sup> Alemika, E.E.O., “Criminal Justice: Norms, Politics, Institutions, Processes and Constraints.” In Chikwanha, A.B. (ed.), *The Theory and Practice of Criminal Justice in Africa*. Pretoria: Institute for Security Studies, 2009, pp. 11-33, p. 24.

<sup>99</sup> For a detailed account of the early development of the juvenile courts in the US, see particularly Pitts, J., “Youth Justice in England and Wales”, op. cit; Butts, J.A., “Can we do Without Juvenile Justice?” *Criminal Justice Magazine*. Vol.15 No. 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/15-1\\_jb.html](http://www.abanet.org/crimjust/juvjus/cjmag/15-1_jb.html) (accessed 6 January 2011); Shepherd, R.E., Jr., “Still Seeking the Promise of Gault: Juveniles and the Right to Counsel.” *Criminal Justice Magazine*. Vol.15 Issue 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html](http://www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html) (accessed 6 January 2011); Inciardi, J., *Criminal Justice*. 7<sup>th</sup> edn. New York/Oxford: Oxford University Press, 2002; Pickett, R.S., *House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857*. Syracuse: Syracuse University Press, 1969; Regoli, R.M. and J.D. Hewitt, *Delinquency in Society*. 4<sup>th</sup> edn. Boston: McGraw-Hill, 2000; Odongo, G.O., “The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context”, op. cit; Hoghuhi, M., “The Juvenile Delinquent has Become the Demon of the Twentieth Century.” In Hoghuhi, M., *The Delinquent: Directions for Social Control*. London, Burnet Books 13, 1983; and Steinberg, L., “Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question.” *Criminal Justice Magazine*. Vol.18 No. 3, 2003. Available at [www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html](http://www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html) (accessed 13 January 2011).

<sup>100</sup> Odongo, *ibid*, p. 18.

On his part, Pitts points out that in both the US and the UK, when the concept of juvenile justice emerged in the late 19<sup>th</sup> century, the responsibility for this new form of children and youth justice in the criminal justice system was placed ‘in the hands of a new legal and administrative entity, the juvenile court.’<sup>101</sup> Pitts points out that by 1910 separate juvenile courts with distinct and discrete institutional and administrative machinery for dealing with young offenders had been established in most Western European countries.<sup>102</sup>

To date, international law has developed human rights norms that require the criminal system to observe a number of basic rights and freedoms as well as juvenile justice in the administration of the criminal justice system. Lacey, et al, observe that this development was made clear over 150 years when the doctrine of “due process” was given more weight in the English criminal justice system. This was made possible ‘by the expansion of criminal law’s scope and by liberal ideas about the rights of individuals *vis-à-vis* the state.’<sup>103</sup> According to Inciardi, the doctrine of due process ‘emphasizes the need to protect procedural rights [in the criminal justice system] even if this prevents the legal system from operating with maximum efficiency.’<sup>104</sup> The due process rights have been incorporated in a number of human rights instruments,<sup>105</sup> including the CRC and the ACRWC; consequently, their incorporation in municipal juvenile justice law.

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<sup>101</sup> Pitts, J., “Youth Justice in England and Wales”, op. cit, p. 73.

<sup>102</sup> Ibid.

<sup>103</sup> Lacey, N. et al, *Reconstructing Criminal Law: Text and Materials*. 3<sup>rd</sup> edn. London: LexisNexis/Butterworths, 2003, p.15.

<sup>104</sup> Inciardi, J.A., *Criminal Justice*, op. cit, p. 13.

<sup>105</sup> Alemika, E.E.O. “Criminal Justice: Norms, Politics, Institutions, Processes and Constraints”, op. cit, p. 17.

Christina Maganga's work entitled: "Administration of Juvenile Justice in Tanzania: A study of its Compatibility with International Norms and Standards,"<sup>106</sup> examines the nature and scope of administration of juvenile justice in Tanzania by identifying the gap between the now-repealed juvenile justice law and practice. She also places much emphasis on international standards for the administration of juvenile justice and concludes that: 'Although some Tanzanian laws and international standards on administration of juvenile justice provide guidance for the children's rights, the practice of courts and other state organs defeat the purpose.'<sup>107</sup>

However, this work merely provides a descriptive analysis of the administration of juvenile justice in Tanzania as it was laid down in the now-repealed Children and Young Persons Act.<sup>108</sup> As will be seen in this study, this law derived its basis on its English predecessor, the Children and Young Persons Act (1933), which was repealed and replaced by the end of 1930s. In Tanzania, though, it remained in force despite its archaic characteristics and ramifications on the administration of juvenile justice in the context of contemporary international children's rights standards. A point of departure in the present study is, therefore, that it premises issues of administration of juvenile justice in the contemporary standards and norms as articulated in the existing international children's rights instruments.

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<sup>106</sup> Maganga, C.S., "Administration of Juvenile Justice in Tanzania: A Study of its Compatibility with International Norms and Standards." LL.M Thesis, Raoul Wallenberg Institute of Human Rights, Lund University, 2005.

<sup>107</sup> Ibid, p. 8.

<sup>108</sup> Cap. 13 R.E. 2002. This law was repealed by Section 160(d) and replaced by Parts IX and X of the Law of the Child Act (2009).

Although many authors agreeably points out the need to have clear methods,<sup>109</sup> mechanisms and institutions for the domestic implementation of children's rights in general and the rights of children in conflict with the law in particular, there is a dearth of literature as to which method is efficient in given circumstances surrounding the administration of juvenile justice. Therefore, this study strives to explore appropriate and applicable modes for effective implementation of juvenile justice principles in Tanzania basing on lessons learnt from the South African example.

### **1.7 Research Methodology**

The subject under review in this study is rather complex, involving relatively intertwined stakeholders, both international and municipal legal principles, and a myriad of problems and challenges facing children in conflict with the law. Now that the processing of children in conflict with the law is well entrenched in state laws, the study applies the "legal centralism approach." This approach centres on the laws that are made and enforced by the state.<sup>110</sup> Viewed in this context, as John Griffiths points out, under the legal centralism principle 'law is and should be the law of the state, uniform for all persons, exclusive of all other law, and administrated by a

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<sup>109</sup> See, for instance, Doek, J. et al (eds.), *Children on the Move: How to Implement their Rights to Family Life*. The Hague/Boston/London: Martinus Nijhoff, 1996; Ncube, W., "Prospects and Challenges in Eastern and Southern Africa: The Interplay between International Human Rights Norms and Domestic Law, Tradition and Culture." In Ncube, W. (ed.), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa*. Brookfield, Vt: Ashgate/Dartmouth, 1998; and Fottrell, D., "One Step Forward or Two Steps Sideways? Assessing the First Decade of the Children's Convention on the Rights of the Child." Fottrell, D. (ed.), *Revisiting Children's Rights 10 Years of the UN Convention on the Rights of the Child*. The Hague/London/Boston: Kluwer Law International, 2000.

<sup>110</sup> Bentzon, A.W., et al, *Pursuing Grounded Theory in Law: South-North Experiences in Developing Women's Law*. Oslo: Tano Aschehoug, 1998, p.31. See also Jonas, op. cit, p. 5.

single set of state institutions.’<sup>111</sup> Using this approach, this study examines international and state laws, norms, institutions, international and national publications, and other international legal instruments relating to the rights of children in conflict with the law, with a view to critically assessing what the juvenile legal regimes in South Africa and Tanzania provide. This approach has enabled this thesis to unearth challenges, problems, gaps and best practices inherent in the administration of juvenile justice in the two countries under study.

In this regard, the study has utilized mostly library research work complemented with field research. In this context, primary data for the study were obtained from the analysis of relevant international human rights instruments and municipal laws, law reports, journals, periodicals, textbooks, declarations, Parliamentary Hansards, general comments and concluding observations of relevant international treaty bodies, and state reports on children’s rights generally and on juvenile justice in particular. This entailed maximum use of the library and the internet that was complemented by data obtained from the field as secondary sources of information used in making relevant analyses, observations and conclusions in this study. Paper presentations and group or target-oriented discussions were also made at various workshops and seminars as secondary sources for the research.

In order to achieve this, three sets of questionnaires were developed for the following respondents: first, children in conflict with the law; second, juvenile justice

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<sup>111</sup> Griffiths, J., “What is Legal Pluralism.” *Journal of Legal Pluralism*. Vol. 24, pp. 1-55, p. 3.

personnel; and, third, victims of child offending and members of the general public. The questionnaires were administered on a number of selected respondents, who provided practical experience on the way the juvenile justice system is administered and problems, challenges and gaps inherent therein.

The study has also used a comparative approach to studying the administration of juvenile systems in Tanzania and South Africa, whereby respective juvenile justice laws and practices have been analysed in order to find out challenges, gaps and problems encountered and how they are addressed in the process. This approach has also helped us to identify the best practices for Tanzania to learn from the South African experience in the administration of juvenile justice.

In order to get a comprehensible, comparative picture on the best practices in the administration of juvenile justice the researcher visited and interacted with the United Nations Committee on the Rights of the Child (CROC), the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) as well as child justice practitioners in both South Africa and Tanzania. In particular, the researcher participated in presentation of alternative reports relating to Tanzania's implementation of the CRC and the ACRWC before the CROC and ACERWC, respectively; and participated in two public hearings before the African Court on Human and Peoples' Rights (AfCHPR) in March<sup>112</sup>, June<sup>113</sup> and September<sup>114</sup> 2012

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<sup>112</sup> In March 2012, the AfCHPR conducted its first public hearing of a case under Rule 43(1) of its Rules in *Femi Falana Femi Falana v African Union*, Application No. 001/2011. This matter concerned the validity of Article 34 (6) of the Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights (the Protocol). In this matter, the Applicant, Mr. Femi Falana, a Nigerian-based lawyer, alleged that he had made several



in Arusha, Tanzania. Whereas in the former the researcher participated as an

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attempts to get the Federal Republic of Nigeria to deposit the declaration required under Article 34 (6) of the Protocol to no avail. He alleged further that he had been denied access to the Court because of the failure or refusal of Nigeria to make the declaration to accept the competence of the Court in line with Article 34 (6) of the Protocol. He submitted that since his efforts to have Nigeria make the declaration had failed, he decided to file an application against the African Union, as a representative of its then 53 Member States (now 54 after South Sudan was admitted), asking the Court to find Article 34 (6) of the Protocol as inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples' Rights (African Charter) as, according to him, the requirement for a State to make a declaration to allow access to the Court by individuals and Non-governmental organizations was a violation of his rights to freedom from discrimination, fair hearing and equal treatment, as well as his right to be heard. The Respondent, the African Union, disputed the allegations of the Applicant, and maintained that they were ill-founded, as the African Union is neither a party to the African Charter on Human and Peoples' Rights, nor to the Protocol, and is not the legal representative of its member states, which are Sovereign States. The Respondent submitted further that the Court had no competence to decide the matter, arguing that the application was inadmissible for lack of standing by the Applicant before the Court, the Respondent not being a party to the African Charter and the Protocol and for non-exhaustion of local remedies. According to the Respondent, Article 34 (6) of the Protocol is not inconsistent with the African Charter, nor does it oust the jurisdiction of the Court, and the obligations of State Parties to the African Charter and the Protocol could not be inferred on the African Union and are only applicable to State Parties thereto. The Ruling on this matter was due in June 2012. More information on this matter is available at [http://www.african-court.org/fr/images/documents/Sensitization\\_Visits/Press\\_Releases\\_2012/English/press\\_release\\_on\\_public.pdf](http://www.african-court.org/fr/images/documents/Sensitization_Visits/Press_Releases_2012/English/press_release_on_public.pdf) (accessed 18 June 2012).

<sup>113</sup> *Tanganyika Law Society, Legal and Human Rights & Rev. Christopher Mtikila v The United Republic of Tanzania*, Application No's. 009 and 011/2011, pending in the African Court on Human and Peoples' Rights. This application concerned alleged violation of Articles 2, 10 and 13 (1) of the African Charter on Human and Peoples' Rights (the Charter), Articles 3, 22, 25 and 26 of the International Covenant on Civil and Political Rights (ICCPR) and Articles 1, 7, 20 and 21 (1) of the Universal Declaration of Human Rights (UDHR). The Applicants, Tanganyika Law Society (TLS), Legal and Human Rights Centre (LHRC) and Rev. Christopher Mtikila, alleged that the United Republic of Tanzania (the Respondent) had violated, and is still violating, the democratic principles and the political rights of its citizens by enacting the Eighth Constitutional Amendment of 1992 and the Eleventh Constitutional Amendment Act (No 34 of 1994), which prohibit independent candidates from offering their candidature for Presidential, Parliamentary and Local Government elections, as a candidate is required to be a member of and be sponsored by a political party. Therefore, the Applicants requested the Court to declare that the Respondent was in violation of Articles 2, 10 and 13 (1) of the Charter, Articles 3, 22, 25 and 26 of the ICCPR and to order that the Respondent effect constitutional, legislative and other measures to guarantee basic political rights and allow independent candidates to contest Presidential, Parliamentary and Local Government elections. The Respondent disputed the allegations of the Applicants and asked the Court to declare the application inadmissible. The Respondent maintained that it had not violated the right to participate in Public/Government Affairs contrary to the Charter and the ICCPR, as these instruments were not directly applicable in Tanzania. The Respondent further submitted that the prohibition of independent candidates for election to Presidential, Parliamentary or Local Government was permissible based on the social needs of Tanzania. The judgment in this matter was to be rendered within three months from the date of completion of the deliberations as per Rule 59 of the Rules of the Court. more information on this application is available at <http://www.african-court.org/en/index.php/news/latest-news/148-public-hearing-mtikila-case-2> (accessed 18 June 2012).

<sup>114</sup> On 14-15 September 2012 the researcher participated in the validation of the Court's five-year Strategic Plan and Plan of Action thereof. This strategy is the first to be prepared by the Court since its inception, before which the Court operated on annual workplans.

observer representing the ACERWC, in the latter he was representing (as an advocate) the 1<sup>st</sup> Applicant in the hearing. These visits to the CRC, ACERWC and AfCHPR provided the researcher with valuable information and contacts with officials of the Court as well as he interviewed a number of stakeholders in the work of the Court, including parties, judges, the court registry officials and advocates participating in the hearings before the Court. Insofar as the interviews with these respondents provided general and specific experiences they had in the work and mandate of these bodies, the same have been used holistically to stimulate ideas and heads of inquiry relating to the effectiveness of these bodies in the sphere of human rights and children's rights protection within their respective jurisdictions. As such, the nature of such interviews has made it necessary to omit the particular names and descriptions of such respondents from the main body or bibliography of this thesis.

The researcher also attended and presented a paper at an International Conference on Violence against Children in Juvenile Justice Systems that was held in Bishkek, Kyrgyzstan, in September 2012. The conference was organised by Penal Reform International (PRI) in collaboration with UNICEF and the Project to End Torture and Ill-treatment of Children. At this conference the researcher met such distinguished child rights experts as Prof Jaap Doek (former Chairperson, UN Committee on the Rights of the Child); and Justice Imman Ali (Judge of the Appellate Division of the Bangladesh Supreme Court), whose expertise on child justice tremendously informed this study, particularly on diversion.

In the end, the materials so obtained were subjected to critical scholarly inquiry and analysis to enable the researcher to come up with realistic conclusions and recommendations.

### **1.8 Limitations of the Study**

This study is limited by a number of factors. First, although the subject of children's rights in general, and juvenile justice in particular, has been well researched in South Africa, in Tanzania there is a dearth of such research, particularly regarding the influence of international child rights law on domestic legislation. This is largely due to the infancy of available state practice and jurisprudence on juvenile justice in Tanzania, as compared to South Africa where there are quite opulently researched materials as well as a progressively emerging jurisprudence on juvenile justice. Although the thesis aims at contributing to knowledge on juvenile justice and thus bridging this gap in Tanzania, there was scarcity of research sources in relation to a number of specific juvenile justice issues considered. In order to remedy the problem of the dearth of literature on juvenile justice in Tanzania, the thesis made an attempt at placing reliance on the United Nations Committee on the Rights of the Child (CROC)'s and South African emerging jurisprudence on this subject. It also considered relevant comparative interpretations on these issues by other UN and regional human rights bodies, particularly the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) and domestic courts and administrative bodies.

Second, when the Law of the Child Act (LCA) was enacted in 2009 and became operational on 1<sup>st</sup> April 2010 the Rules of Procedures to regulate proceedings in the Juvenile Court were not promulgated by the Chief Justice as required under Section 99(1) of the LCA. Up until this thesis was completed<sup>115</sup>, the rules were yet to be promulgated. This has resulted in the “delay” on the part of the Juvenile Court to fully apply the LCA with regards to the administration of juvenile justice. As such, there was no jurisprudence or practice by the state juvenile justice institutions available to provide information to the researcher regarding the application of the juvenile justice provisions in the LCA. This is contrary to the South African case, whereby the coming into force of the Child Justice Act on 1<sup>st</sup> April 2010 went hand in hand with the operationalization of the newly promulgated rules and practice notices/guides/policies. As a result, there is an emerging progressive jurisprudence on juvenile justice in South Africa.<sup>116</sup>

Third, the implications of the lack of Juvenile Court Rules have been that there are no specialised juvenile justice institutions<sup>117</sup> and personnel in place in Tanzania. What are available are the general personnel in these institutions that are assigned to deal with children in conflict with the law on a case-by-case basis, with no adequate training or skills to do their job. As such, the researcher did not get the benefit of

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<sup>115</sup> By the time this thesis was at the final stages of completion, the Chief Justice had engaged consultants who developed draft Juvenile Court Rules. The draft rules were discussed at a stakeholders’ session held at the Protea Court Yard Hotel in Dar es Salaam on 18-19 October 2012. It was noted at this session that the Chief Justice would adopt, and consequently gazette, the Rules in the course of 2013. This researcher participated at this session and has notes of the proceedings on file.

<sup>116</sup> Considered in Chapter Six herein after.

<sup>117</sup> In this context juvenile justice institutions include the Police, Prosecution Agency, Social Welfare Department, Correctional Services (Prisons Services, for they host children who have not been placed in appropriate juvenile detention and post-trial facilities), Bar Association and other civil society organisations working with children in conflict with the law.

obtaining relevant information from specialised juvenile justice institutions and personnel, which is not the case in South Africa, where such institutions and personnel are in place. In particular, it was difficult for the researcher to obtain data relating to children in conflict with the law disaggregated by age, gender, offences committed and the nature of sanction imposed on, or action taken against, such children. Data disaggregated in accordance with arrests, pre-trial or police bail, prosecutions, releases, convictions/sentences, diversions, or corrections for children in conflict with the law was difficult to come by in these institutions. This fact was particularly responsible for the situation where the thesis has to devote a significant amount of space to describing the law, principles, structures and practices of the juvenile justice regime in the context of international juvenile justice standards.

Although other common law East African countries<sup>118</sup> have domesticated juvenile justice standards in their national legislation, South Africa was chosen to provide a comparative experience due to its comprehensive domestication and effective application of international juvenile justice standards enshrined in the CJA as well as in the 1996 Constitution. This can be evidenced particularly in the number of cases involving child offenders that have been dealt with by the courts as well as the juvenile justice institutions established and the specialised personnel recruited to man the juvenile justice system in South Africa.<sup>119</sup>

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<sup>118</sup> Whereas Uganda enacted its Children's Act in 1996, Kenya enacted its Children Act in 2004.

<sup>119</sup> Considered in Chapter Six herein after.

## CHAPTER TWO

### 2.0 THE NEXUS BETWEEN CRIMINAL JUSTICE AND JUVENILE JUSTICE

#### 2.1 Introduction

The concepts of crime and criminal justice ‘have been a part of human history for so many millennia that their roots are buried in antiquity.’<sup>120</sup> Amongst the early scholars to speak of crime and justice include Cicero (in the 1<sup>st</sup> century B.C.) and later Aristotle, which means that the concept of criminal justice is as old as civilization.<sup>121</sup> During the early Greek and Roman legal values and theories, emphasis was placed only on the study of the philosophy of justice as opposed to the contemporary legal thinking, which describes criminal justice as pertaining to the norms, functions, structure and decision-making processes ‘of agencies that deal with the management and control of crime and criminal offenders – the police, the courts, and correctional systems.’<sup>122</sup>

Implicitly, it embodies ‘processes and decisions pertaining to the enactment and enforcement of criminal laws, the determination of the guilt of crime suspects, and the allocation and administration of punishment and other sanctions.’<sup>123</sup> Accordingly, the norms, institutions and processes of criminal justice administration ‘are politically determined, in the sense that their articulation and incorporation into the

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<sup>120</sup> Inciardi, J.A., *Criminal Justice*. 7<sup>th</sup> edn. New York: Oxford University Press, 2002, p. xi.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Alemika, E.E.O., “Criminal Justice: Norms, Politics, Institutions, Processes and Constraints.” In Chikwanha, A.B. (ed.), *The Theory and Practice of Criminal Justice in Africa*. Pretoria: Institute for Security Studies, 2009, p. 11

governance systems of society involve the exercise of political power through the legislative and judicial organs of government.<sup>124</sup>

Viewed in this sense, the legislature, police, courts and prisons ‘are the core institutions of criminal justice administration in modern states.’<sup>125</sup> At the heart of the concept of criminal justice, thus, are ‘normative ideas of transgression against criminal code: intention, responsibility or culpability and desert.’<sup>126</sup> As Etannibi Alemika argues, the criminal justice system ‘is a sub-sector of the wider legal order in society.’<sup>127</sup> Viewed in this sense, the legal system functions to prevent and resolve disputes amongst citizens, between citizens and the state, and among groups in society – i.e. socio-cultural, political, economical and governmental agencies. Within the criminal justice system there are several branches, significant to this study is the juvenile justice system.

Therefore, this Chapter examines the fundamentals of criminal justice as it impacts on human rights and juvenile justice. Viewed in this sense, the Chapter examines the relationship between criminal justice and juvenile justice as the concept and practice of juvenile justice derived from developments in the criminal justice system in the

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<sup>124</sup> Ibid.

<sup>125</sup> Aduba, N.J. and E.I. Alemika, “Bail and Criminal Justice in Nigeria.” In Chikwanha, A.B. (ed.), *The Theory and Practice of Criminal Justice in Africa*. Pretoria: Institute for Security Studies, 2009, pp.85-109. P. 88. See also Alemika, E.E.O. and E.A. Alemika, “Penal Policy: Prison Conditions and Prisoners’ Rights in Nigeria.” In Bem Angwe, B. and C.J. Dakas (ed.), *Readings in Human Rights*. Lagos: Graphic, 2005.

<sup>126</sup> Alemika, E.E.O., op. cit, p. 11. According to Alemika, the term “desert” is a central focus of the criminal justice system, which ‘refers to what the criminal, victim and society deserve as a consequence of crime.’ Ibid.

<sup>127</sup> Ibid, p. 24.

19<sup>th</sup> century after the first juvenile court was established in Chicago in 1899.<sup>128</sup> The Chapter also discusses the place of human rights and juvenile justice in the administration of the criminal justice system, in the context that the former are premised on the need to balance between the interest of the state in prosecuting criminal offenders and the offenders' basic human rights and needs. In this context, the Chapter examines the essence of the "due process rights" – i.e. the right to a fair trial and a public hearing by a competent, independent and impartial tribunal established by, and acting in accordance with the, law – in the administration of the criminal justice system.

## 2.2 The Concept of (Criminal) Law

Any meaningful study on crime, criminal law, criminal justice (within which juvenile justice is premised) and criminology needs to be grounded on the understanding of the nature and purpose of law; because law 'touches virtually every human interaction.'<sup>129</sup> In many societies in the world to date, law is used 'to protect ownership, to define the parameters of private and public property, to regulate

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<sup>128</sup> For a detailed account of the early development of the juvenile courts in the US, see particularly Pitts, J., "Youth Justice in England and Wales." In Mathews, R. and J. Young (eds.), *The New Politics of Crime and Punishment*. Oregon: William Publishing, 2003, p. 71-99; Butts, J.A., "Can we do Without Juvenile Justice?" *Criminal Justice Magazine*. Vol.15 No. 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/15-1\\_jb.html](http://www.abanet.org/crimjust/juvjus/cjmag/15-1_jb.html) (accessed 6 January 2011); Shepherd, R.E., Jr., "Still Seeking the Promise of Gault: Juveniles and the Right to Counsel." *Criminal Justice Magazine*. Vol.15 Issue 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html](http://www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html) (accessed 6 January 2011); Inciardi, J., *Criminal Justice*. 7<sup>th</sup> edn. New York/Oxford: Oxford University Press, 2002; Pickett, R.S., *House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857*. Syracuse: Syracuse University Press, 1969; Regoli, R.M. and J.D. Hewitt, *Delinquency in Society*. 4<sup>th</sup> edn. Boston: McGraw-Hill, 2000; Odongo, G.O., "The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context." LL.D. Thesis, University of Western Cape, 2005; Hoghuhi, M., "The Juvenile Delinquent has Become the Demon of the Twentieth Century." In Hoghuhi, M., *The Delinquent: Directions for Social Control*. London: Burnet Books 13, 1983; and Steinberg, L., "Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question." *Criminal Justice Magazine*. Vol.18 No. 3, 2003. Available at [www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html](http://www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html) (accessed 13 January 2011).

<sup>129</sup> Reid, S.T., *Crime and Criminology*. 5<sup>th</sup> edn. New York: McGraw Hill, 2006, p. 12.



business, to raise revenue, and to provide compensation when agreements are broken. Laws define the nature of institutions such as the family. Laws regulate marriage and divorce or dissolution, adoption, the handling of dependent and neglected children, and inheritance of property.’<sup>130</sup>

In actual sense, the concept of law has preoccupied philosophers and social thinkers for centuries,<sup>131</sup> who have, now and then, came up with different, contending definitions of what is law.<sup>132</sup> This is because, ‘like other social and historical phenomena, law, too, is a complex<sup>133</sup> social phenomenon.’<sup>134</sup> As such, ‘[t]here cannot be a one single answer or definition of “law.” [But this] does not mean that we cannot understand the nature of law.’<sup>135</sup>

A better understanding of law is always sought by looking at the nature and function of law in a given social set up.<sup>136</sup> In the political sphere, for instance, laws are created to protect legal and political systems, as it organises and regulates power relationships in a given society. In essence, laws establish who is superordinate and who is subordinate. Laws ‘maintain the *status quo* while permitting flexibility when times change. Laws, particularly criminal laws, are designed to preserve order as well as to protect private and public interests. Society determines that some interests

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<sup>130</sup> Ibid.

<sup>131</sup> Shivji, I.G., et al, *Constitutional and Legal System of Tanzania: A Civics Sources Book*. Dar es Salaam: Mkuki na Nyota Publishers, 2004, p. 3. See also Arbetman, L. P, et al, *Street Law: A Course in Practical Law*. 5<sup>th</sup> edn. New York: West Publishing Company, 1994, p. 3; Reid, S.T., op. cit, p. 12; Pember, D. R. and C. Calvert, *Mass Media Law*. New York: McGraw Hill, 2006, p. 2;

<sup>132</sup> Pember, D.R. and C. Calvert, *ibid*, p. 2.

<sup>133</sup> Ellison, J., *Business Law*. Exeter: Business Education Publishers Limited, 1993, p. 1.

<sup>134</sup> Shivji, et al, op. cit, p. 3.

<sup>135</sup> Reid, op. cit, p. 12.

<sup>136</sup> Shivji, et al, op. cit.

are so important that a formal system of control is necessary to preserve them; therefore, laws must be enacted to give the state enforcement power.’<sup>137</sup>

In the light of the foregoing conceptualisation, law can be viewed as ‘a formal system of social control that may be exercised when other forms of control are not effective.’<sup>138</sup>

For some people, law is described as any social norm or any organised or ritualised method of settling disputes; though many scholars insist that this view may be ‘a bit more complex, that some system of sanction is required for a genuine legal system.’<sup>139</sup> In traditional Africa, for instance, ‘there has typically existed a process of dispute settlement conducted by elders or accepted influential “big men” who manage the process of arbitration and negotiation with an emphasis on conciliation.’<sup>140</sup> In this context, the traditional African concept of law is based on the philosophy of “Ubuntu”, whose ‘features include solidarity, unity, care for one another, compromise, and tolerance.’<sup>141</sup> Unlike the English and continental European concept of law that insists on retribution or punishment, the traditional African concept of law focuses on reconciliation and restoration of communal relationship and social cohesion.<sup>142</sup>

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<sup>137</sup> Reid, op. cit.

<sup>138</sup> Ibid.

<sup>139</sup> Pember and Calvert, op. cit, p. 2.

<sup>140</sup> Bowd, R., “Status quo or Traditional Resurgence: What is Best for Africa’s Criminal Justice Systems?” In Chikwanha, A.B. (ed.), *The Theory and Practice of Criminal Justice in Africa*. Pretoria: Institute of Security Studies, 2009, pp. 35-55, p. 50.

<sup>141</sup> Nwolise, O.B.C., “Traditional Approaches to Conflict Resolution Among the Igbo People of Nigeria: Reinforcing the Need for Africa to Rediscover its Roots.” *AMANI Journal of African Peace*. Vol. 1 No. 1, 2004, pp. 59-80, p. 61.

<sup>142</sup> Bowd, op. cit, p. 49.

In view of John Austin, a 19<sup>th</sup> century English jurist, law is a set of definite rules of human conduct with appropriate sanctions for their enforcement. To him, both the rules and sanctions must be prescribed by duly constituted human authority.<sup>143</sup> According to Roscoe Pound, an American legal scholar, law is really a social engineering which attempts to command the way people in a given society should behave.<sup>144</sup>

For the purpose of this study, it is probably trite to consider law as a set of rules and regulations that guide human conducts; and a set of formal, governmental sanctions that are applied when those rules or regulations are violated. This description of law justifies the contention that:

The principal objective of a legal system is the establishment of rules which in the broadest sense are designed to regulate relationships. Human societies are highly complex social structures. Without systems of rules or codes of conduct to control them, such societies would find it difficult to maintain their cohesion, and would gradually break up.<sup>145</sup>

Very often, human interactions degenerate into differences or conflicts between individuals or institutions. This would, thus, need binding rules to help the conflicting parties to reconcile their conflicts or differences through use of established legal principles and rules that have been developed to define individual rights, duties and obligations. So criminal law, being a fundamental branch of law, falls within this ambit.

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<sup>143</sup> The Austinian conception of law is discussed at length in Pember and Calvert, *ibid*; Rutherford, L. and S. Bone (eds.), *Osborne's Concise Law Dictionary*. 8<sup>th</sup> edn. London: Sweet & Maxwell, 1993, p. 194; and Shivji, et al, *op. cit*, pp. 3-4.

<sup>144</sup> Pember and Calvert, *ibid*, p. 3.

<sup>145</sup> Ellison, *op. cit*, p. 1.

### 2.2.1 The Sources and Nature of Criminal Law

The modern-day sources and nature of law have passed a long period of contending views amongst philosophers and jurists. In the past, philosophers and other scholars had ‘argued over the sources of law, some contending that laws derived from rulers, referred to as *positive law*, are not the only laws.’<sup>146</sup> For instance, some scholars have argued that *natural law*, also referred to as *higher law*, is an important source of law that comes from higher rulers and thus ‘understood to be binding on people even in the absence of, or in conflict with, laws of the sovereigns.’<sup>147</sup> In the main, natural law focuses perhaps on the earliest understanding of law and crime in human society. So, natural law ‘refers to a body of principles and rules, imposed upon individuals by some power higher than man-made law, that are considered to be uniquely fitting for and binding on any community of rational beings.’<sup>148</sup>

Hugo Grotius, a Dutch early natural law theorist, jurist and statesman<sup>149</sup> – in his major work *De Jure Belli ac Pacis* published in 1625<sup>150</sup> – stated that natural law derives from the law of nature. To him, the law of nature is ‘a dictate of right reason which points out that an act, according as it is or in conformity with rational nature,

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<sup>146</sup> Reid, cit.

<sup>147</sup> Ibid.

<sup>148</sup> Arbetman, et al, op. cit, p. 29.

<sup>149</sup> Hugo Grotius or *Huig de Groot*, or *Hugo de Groot* (1583-1645) worked as a jurist in the Dutch Republic and laid the foundations for international law, based on natural justice. He was also a philosopher, Christian apologist, playwright and poet. For a detailed biography of Hugo visit [http://en.wikipedia.org/wiki/Hugo\\_Grotius](http://en.wikipedia.org/wiki/Hugo_Grotius) (accessed 30 December 2011).

<sup>150</sup> This treatise advanced a system of principles of natural law, which were held to be binding on all people and nations regardless of local custom.

has in it a quality baseness or moral necessity and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.’<sup>151</sup>

From this explanation, an inference may be made to the effect that: ‘Since natural law has generally referred to that which determines what is right and wrong and whose power is made valid by nature, it follows that its precepts should be eternal, universal and unchangeable.’<sup>152</sup> Viewed in this regard, an examination of natural law<sup>153</sup> from the time of the ancient Greeks to the present legal theory suggests that there is no single and unchanging view of the concept.<sup>154</sup> To Roman jurists, for example, *jus naturale*, or natural law, meant a body of ideal principles that people could understand rationally and that included the perfect standards of right conduct and justice. Throughout the Middle Ages the law of nature was identified with the Bible, with the laws and traditions of the Catholic Church, and with the teachings of the church fathers.<sup>155</sup>

Historically, the concept of natural law was seen in first known written legal document called the Code of Hammurabi,<sup>156</sup> which was an embodiment of the then

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<sup>151</sup> Grotius, H., *De Jure Belli ac Pacis*. Cited in Boutillier, C.G.L., *American Democracy and Natural Law*. New York: Columbia University, 1950, p. 57.

<sup>152</sup> Arbetman, et al, op. cit, p. 29.

<sup>153</sup> *Natural law* or the *law of nature* [Latin: *lex naturalis*] is a theory that posits the existence of a law whose content is set by nature and that therefore has validity everywhere. See particularly, “Natural Law.” In *International Encyclopedia of the Social Sciences*.

<sup>154</sup> See, for instance, Strauss, L., *Natural Right and History*. Chicago; University of Chicago Press, 1953.

<sup>155</sup> See particularly Haines, C.G., *The Revival of Natural Law Concepts*. Cambridge: Harvard University Press, 1930, pp. 6-11; Wright, B.F., *American Interpretation of Natural Law*. Cambridge: Harvard University Press, 1931, p. 6; and Arbetman, et al, op. cit, p. 29.

<sup>156</sup> Hammurabi (ruled ca. 1796 BC – 1750 BC) believed that he was chosen by the gods to deliver the law to his people. In the preface to the law code, he states, ‘Anu and Bel called by name me,

existing rules and customs of Babylonia, dated approximately 1900 B.C.<sup>157</sup> It incorporated the religious habits of the Babylonian people and emphasised the importance of religious beliefs.<sup>158</sup> In the main, it reflected the economic problems of Babylonian society, 'giving specific regulations about how commodities were to be priced and marketed. The 'eye for an eye, tooth for a tooth' philosophy was ingrained in the code. If a physician performed a careless operation, his hand was removed; if he was responsible for the death of a woman by causing a miscarriage, the life of one of his daughters was taken.'<sup>159</sup>

So, the code 'presented the idea that justice was man's inherent right, derived from supernatural forces rather than by royally bestowed favour.'<sup>160</sup>

As such, in order to better understand the nature and sources of criminal law one has to take into account the basic elements that constitute the body of rules and

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Hammurabi, the exalted prince, who feared God, to bring about the rule of righteousness in the land.' The laws are numbered from 1 to 282 (numbers 13 and 66-99 are missing) and are inscribed in Old Babylonian cuneiform script on the eight-foot tall stela. It was discovered in December 1901 in Susa, Elam, which is now Khuzestan, Iran, where it had been taken as plunder by the Elamite king Shutruk-Nahhunte in the 12th century BC. It is currently on display at the Louvre Museum in Paris, France. The code is often pointed to as the first example of the legal concept that some laws are so basic as to be beyond the ability of even a king to change. Hammurabi had the laws inscribed in stone, so they were immutable. The Code of Hammurabi was one of several sets of laws in the Ancient Near East. Most of these codes come from similar cultures and racial groups in a relatively small geographical area, and they had passages which resemble each other. The earlier Code of Ur-Nammu (21<sup>st</sup> century BC), the Hitte laws (ca. 1300 BC), and Mosaic Law (traditionally ca. 1400 BC under Moses), all contain statutes that bear at least passing resemblance to those in the Code of Hammurabi and other codices from the same geographic area. Available at [http://en.wikipedia.org/wiki/Code\\_of\\_Hammurabi](http://en.wikipedia.org/wiki/Code_of_Hammurabi) (accessed 30 April 2011).

<sup>157</sup> Reid, op. cit, p. 12.

<sup>158</sup> Possi, A., "Criminal Justice in Disrepute: An Overview of Treatment of Accused Persons and Convicts in Tanzania." *Open University Law Journal*. Vol. 1 No. 1, 2007, pp. 83-97, p. 84.

<sup>159</sup> Reid, op. cit, pp. 12-13.

<sup>160</sup> Abraham, H.J., *The Judicial Process*. New York: Oxford University Press, 1968, p. 5.

regulations called law. These elements revolved around the principle of *normativity* of law. This is because:

Law is a system of social rules of special kind of norms. There [are rules] which are prohibitive. They tell what to do. And there [are] rules which are directive. They direct what to do... Law is binding on the person directed to. This is what is called normativity of the law, which means that the members of society are bound to act in accordance with the law. The normativity of law entails sanctions which are established in case of a rule, which is a law, is not adhered to. Thus behind the rules of social behaviour which are called law there is punishment for those who do not follow them.<sup>161</sup>

So, the normativity of law requires that every person in a given society obeys a collection of common standards called norms, failure of which attracts certain form of sanction.<sup>162</sup>

### **2.2.2 Criminal Law as a Method of Social Control of Deviant Human**

#### **Behaviour**

In principle, law emerged as an advanced stage of the methods of social control of human behaviour. Before modern law emerged, social control was achieved in less formal ways, as customs and taboos regulated human behaviours.<sup>163</sup> During the rudimentary stages of mankind evolution, people took care of their own needs and lived at a subsistence level. In fact, they grew or captured their own food and made their clothing and housing; 'they had no need for exchanging goods and services. Submission to custom controlled most of their behaviour; and laws were not necessary. Those who deviated from the norms of the group were spotted easily; the community could react with nonlegal sanctions.'<sup>164</sup>

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<sup>161</sup> Mwakajinga, J.E.A., *Business Law*. Vol. 1. Dar es Salaam: Banyakajinga Elimu Establishments, 2005, p. 3.

<sup>162</sup> Shivji, et al, op. cit, p.4.

<sup>163</sup> Reid, op. cit, p. 13.

<sup>164</sup> Ibid.

During this period of humankind evolution, these informal sanctions of human behaviour were seen as more effective and included a disapproving glance, a frown, a nod, an embarrassing silence, a social invitation, or social isolation. These informal sanctions were successful because:

The threat of being banished from society (or a smaller group) can be a serious deterrent to deviant behaviour. These informal methods of social control are most successful when the group is closely knit, making it relatively easy to know the norms and the general will of the group and to identify transgressors.<sup>165</sup>

That way, it was easy for the early humankind society to maintain social order and control human behaviours through customs and usages. But as society grew bigger and bigger, human behaviours became diverse; and, according to Emile Durkheim (1858-1917),<sup>166</sup> a French sociologist, it is impossible for all people to be alike and to hold the same moral consciousness.<sup>167</sup>

#### **2.2.2.1 The Evolution of Formal Social Control of Deviant Human Behaviour**

Scholars and sociologists, particularly Emile Durkheim,<sup>168</sup> maintain that, as societies grew bigger and became more complex, ‘they developed a division of labour; as that occurred, they moved from mechanical (the less complex type of society in which members are highly integrated through their cultural and functional similarities) to organic solidarity (the more complex type of society in which members are integrated because they are functionally interdependent).’<sup>169</sup> According to Durkheim, in organic societies such as the contemporary ones, some individuals tend to differ

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<sup>165</sup> Ibid. See also Schwartz, R.D., “Social Factors in the Development of Legal Control: A Case Study of Two Israeli Settlements.” *Yale Law Journal*. Vol. 63, 1954, pp. 471-491.

<sup>166</sup> <http://www.emile-durkheim.com> (accessed 3 December 2010).

<sup>167</sup> See Durkheim, E., *The Division of Labour in Society*. New York: Free Press, 1947.

<sup>168</sup> Ibid.

<sup>169</sup> Reid, op. cit, p. 13.



from the collective type – in certain cases; some of these divergences may include criminal behaviour.<sup>170</sup> To him, such criminal behaviour is not because it is intrinsically criminal but because the collectivity defines it criminal.<sup>171</sup> Indeed, Durkheim saw crime as the products of norms. According to him, the concept of wrong is necessary to give meaning to right and is inherent in that concept. For a society to be flexible enough to allow positive divergence, it must permit negative digression as well. In Durkheim's view, even a community of saints will create sinners. If no deviation is permitted, societies become stagnant. He stated that crime 'implies not only that the way remains open to necessary change, but that in certain cases it directly proposes these changes... crime [can thus be] a useful prelude to reforms.'

In this sense he saw crime as being able to release certain social tensions and so have a cleansing or purging effect in society. He further stated that 'the authority which the moral conscience enjoys must not be excessive; otherwise, no-one would dare to criticize it, and it would too easily congeal into an immutable form. To make progress, individual originality must be able to express itself ... [even] the originality of the criminal... shall also be possible.'<sup>172</sup> So, to him, crime helps to prepare society for such changes; it is one of the prices society pays for freedom.<sup>173</sup>

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<sup>170</sup><sup>170</sup> Durkheim, op. cit.

<sup>171</sup> This theory is discussed at length in Reid, op. cit, pp. 13, 128-130.

<sup>172</sup> Available at [http://en.wikipedia.org/wiki/Emile\\_Durkheim](http://en.wikipedia.org/wiki/Emile_Durkheim) (accessed 13 December 2010).

<sup>173</sup> Durkheim, E., *The Rules of Sociological Method*. New York: Free Press, 1964, p. 71.

Expanding the concept of *anomie* – a Greek word meaning ‘without norms’ – which was later expounded by the famous American sociologist, Robert K. Merton (4<sup>th</sup> July 1910 – 23<sup>rd</sup> February 2003),<sup>174</sup> Durkheim believed that ‘one of society’s most important elements is its social cohesion, or *social solidarity*, which represents a *collective conscience*.’<sup>175</sup> To Durkheim, ‘the absence of a sense of community is viewed by some as a major problem in modern society. In explaining this, Durkheim defined two types of solidarity, mechanical and organic.’<sup>176</sup>

To Durkheim, *mechanical solidarity* is characteristic in primitive societies, whereby it is dominated by the collective conscience. The type of law manifests this dominance; where the reason for the existence of law is to ‘discourage individuals from acting in a way that threatens the collective conscience.’<sup>177</sup> However, when societies become larger and more complex, ‘the emphasis in law shifts from the collective conscience to the individual wronged, and law becomes *restitutive*. This shift from mechanical to *organic solidarity* is characterised by an increased need for a division of labour, a division that may be forced and therefore abnormal, leading to the creation of unnatural differences in class and status.’<sup>178</sup>

Therefore, as sociologists have suggested, ‘the development of a formal system of social control was necessary for society to progress.’<sup>179</sup> For instance, after studying

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<sup>174</sup> For Merton *anomie* means: a discontinuity between cultural goals and the legitimate means available for reaching them. See Merton, R.K., “Social Structure and Anomie.” *American Sociological Review*. Vol. 3 No. 5, October 1938.

<sup>175</sup> Reid, op. cit, p. 128.

<sup>176</sup> Ibid.

<sup>177</sup> Ibid.

<sup>178</sup> Ibid.

<sup>179</sup> Ibid, p. 13.

the modern capitalist system, Max Weber reasoned that a precondition of its growth was the development of formal legal rationality. According to him, as societies became more complex and economically advanced, there was an increasing rationality.<sup>180</sup>

#### **2.2.2.2 Comparison Between Criminal Law and Other Social**

##### **Controls of Deviant Human Behaviour**

As we have noted above, law emerged as an advanced stage of social control of human behaviours. Although law has certain similarities with other forms of social control of human behaviours, it significantly differs with these forms for law is more specific than these forms.

##### **(a) Criminal Law is Unequivocal**

Unlike the other forms of social control, law is enacted in clear and explicit terms. For instance, in criminal law, the law defines the nature of the offence and the punishment (or range of types of punishments) ‘to be imposed for conviction of that offence. Laws cannot define every possible situation that would constitute a violation, but... they may be declared unconstitutional if they are vague.’<sup>181</sup> Laws

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<sup>180</sup> Weber, M., *Law in Economy and Society*. Cambridge (MA): Harvard University Press, 1954.

<sup>181</sup> In Tanzania, recent examples of cases in which vague laws that have been declared unconstitutional include: *Chumchua s/o Marwa v Officer i/c of Musoma Prison and the Attorney-General*, High Court of Tanzania at Mwanza, Miscellaneous Criminal Cause No. 2 of 1988 (unreported); *Attorney-General v W.K. Butambala* [1993] TLR 46; *Lohay Akonaay and Another v A.G.*, High Court of Tanzania at Arusha, Miscellaneous Civil Cause No. 1 of 1993 [unreported]; *Julius Ishengoma Francis Ndyababo v the Attorney-General*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 64 of 2001 (unreported); *N.I. Munuo Ng’uni v The Judge i/c High Court (Arusha) and A.G.*, High Court of Tanzania at Arusha, Civil Cause No. 3 of 199 (unreported); *Legal and Human Rights Centre and 2 Others v. A.G.*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 77 of 2005 (unreported); *Christopher Mtikila v A.G.*, High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 10 of 2005 (unreported); and *Baraza la*

must be clear enough to give adequate notice to potential transgressors that they are in danger of violating them.<sup>182</sup> So, criminal law should be certain enough to reduce its unnecessary violation by ordinary citizen.

### **(b) Criminal Law Arises from a Rational Procedure**

Another significant difference between law and other forms of social control of human behaviours is that law arises from a more rational procedure. In its modern character, law is a result of formal enactment process by a legislative body or interpretation by a court that occurs upon adherence to certain laid down legislative or judicial principles. In this case, law becomes applicable to ‘all who transgress its provisions, unless there are justifications or defences for the otherwise illegal acts.’<sup>183</sup> Indeed, law specifies sanctions, and only those sanctions may be applied. Viewed in this perspective, law ‘differs from other types of social control in that its sanctions are applied exclusively by organised political agencies. Physical force may be involved in enforcing the sanctions, although this is limited to reasonable action applied by an official party.’<sup>184</sup>

### **(c) The Application of Criminal Law is ‘Regular’**

Another remarkable difference between law and other forms of social control of human behaviours is that law is characterised by regularity, technically manifested in

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*Wanawake, Tanzania (Bawata) & 5 Others v Registrar of Societies & 2 Others*, High Court of Tanzania, Miscellaneous Civil Cause No. 27 of 1997 (unreported: Judgment delivered in 2009).

<sup>182</sup> Reid, S.T., *Crime and Criminology*, op. cit, p. 13.

<sup>183</sup> Ibid.

<sup>184</sup> Ibid.

the principle of *stare decisis*. This ensures that the application law adheres to the decisions or rulings of courts in previous similar cases. Through the principle of *stare decisis*, courts are able to guarantee security and certainty of their interpretation of the law, in that decided cases establish precedent for future court decisions. However, courts may overrule prior decisions in the light of new facts, reasoning, or changing social conditions.<sup>185</sup>

#### **(d) Other Differences between Criminal Law and Other Forms of Social Control**

Other differences between law and other forms of social control include the fact that: in most legal systems, law, unlike the other social controls, provides for the right of appeal where a person is aggrieved with the decision of a lower tribunal. Another difference is that law does not reward conforming behaviours, for it is primarily concerned with negative sanctions on offenders.<sup>186</sup>

### **2.3 The Concept of Crime and Criminal Law**

In its nature, this work is about crime committed by children and young persons. So, it is trite to describe the concept of crime itself before we move into the details of child offending. The concept of crime has already received different definitions between legal scholars and social scientists. While legal experts stick to the legal definition of crime, social scientists have argued that ‘if we are interested in knowing why people engage in behaviour that is detrimental to society, we should go beyond

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<sup>185</sup> Ibid.

<sup>186</sup> Ibid, p. 15.

the legal definition and include behaviour that is defined as criminal but for which no arrests have been made.’<sup>187</sup> To sociologists, accused persons who have committed offences but have not been prosecuted because of legal technicalities should be included in the definition of crime. To them, the involvement of legal technicalities in describing crime is irrelevant to a study of criminal behaviour.

In addition to the foregoing arguments, some social scientists contend that behaviour that are deviant or different from that of the generally held social norms but not studied should also be included in any study seeking to define what is crime.<sup>188</sup>

However, this study adopts the legal approach to defining crime; because, under the common law, ‘only those persons who have actually been convicted of crimes are considered criminal, and thus it is important to focus on that approach for purposes of official data.’<sup>189</sup> In this sense, ‘the term crime should be limited to its strict legal definition and the term *criminal* used only to refer to someone who has been convicted in an adult criminal court.’<sup>190</sup> This is so contended because: ‘The terms *crime* and *criminal* have severe implications and repercussions. They should be used only after proper procedures have been followed to establish which acts are criminal, as in the case of defining *crime*, or in the case of *criminal*, after a guilty or the determination of guilty by a judge or jury.’<sup>191</sup> However, this contention does not make irrelevant the other non-legal definitions of the terms *crime* and *criminal*.

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<sup>187</sup> Ibid, p. 6.

<sup>188</sup> Ibid, p. 6.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid.

<sup>191</sup> Ibid.

So, according to the legal definition of crime, it is not in dispute that a crime is an act or that must be so defined or prescribed by law. Under the legal definition of crime, no one can be held to be a criminal unless all the basic elements specified by a criminal law are present and proved beyond reasonable doubt. Functionally, the precise legal definition of crime may be put thus: ‘Crime is an intentional act or omission in violation of criminal law (statutory and case law), committed without defence or justification and sanctioned by the state as (an offence).’<sup>192</sup>

So, from this definition, a crime has two important basic elements: action and omission, as described herein below.

### **2.3.1 An Act or Omission**

In the legal definition of crime, an action or omission forms a very central role in the completion of the offence. Under the common law, for a person who is accused of committing an offence to be held liable for that offence, it must be proved in court that he actually undertook some action leading to the commission of that offence. In this sense, the general rule of criminal law, under the common law, is that a person cannot be held liable for a criminal offence for thinking about committing that crime. Under this general rule, certain elements of the offence must be put into action toward the commission of that crime. So, “to consider to murdering a spouse but to do nothing toward the commission of that act is not a crime; hiring someone to murder a spouse is a crime.”<sup>193</sup>

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<sup>192</sup> Tappan, P.W., *Crime, Justice and Correction*. New York: McGraw Hill, 1960, p. 10.

<sup>193</sup> Reid, op. cit, p. 8.

However, a very significant exception to this general rule is that where a person has a legal duty to act in certain ways, but he or she intentionally fails to act in order to prevent the occurrence of an adverse act on an individual. For example, a prison superintendent or warden may be held liable for the death of an inmate who refuses to get his or her meals on ground of striking against the court's denying him or her bail, if the prison statute imposes some legal duty on the warden to make sure that all the inmates under his or her custody are properly attended to.

It should be noted that the exception to the general rule requiring an individual to commit an act leading to commission of an offence *must be grounded in the existence of a legal*, not a moral, duty to act. This means that even if there is in existence of a moral duty to act, an individual cannot be convicted of an offence where there is only a moral, not a legal, duty to act. For example, a person cannot be convicted of an omission to rescue a person locked in a trunk of a car in which he is a passenger, even if that person dies of dehydration. It will only suffice for the accused person to say that he or she did not know that there was a person in the car trunk. As Prof. Sue Reid argues, "A legal duty may exist, however, if we are the parent, spouse, or other close relative, or if we have assumed a duty through a contractual relationship such as operating a licensed day care centre."<sup>194</sup> In special cases, though, legal duties may be imposed on certain individuals in other relations apart from the ones described by Reid.

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<sup>194</sup> Ibid.



### 2.3.2 *mens rea* and *actus reus*

The requirement that for a crime to be proved, an individual must have either *criminally* acted or omitted to act, presupposes yet another important element of criminal law that requires that such act or omission must be voluntary, and the actor must have control over his or her actions. This element is what is technically referred to as *mens rea* – meaning that, the mental element that establishes criminal culpability on the part of the accused person. Under the common law, *mens rea* is a very critical factor in determining whether or not an act or omission was a crime. The essence of the principle of *mens rea* ‘is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it might have, that they can fairly be said to have chosen the behaviour and its consequences.’<sup>195</sup>

However, although the element of *mens rea* is important in the determination of a crime in the criminal law, it has historically not been clearly defined or developed thoroughly by many common law jurisdictions.<sup>196</sup> Nonetheless, it is almost common in many jurisdictions to define the criminal intent through the approach that divides criminal culpability into four mental states: intentional, knowing, reckless, and criminal negligence.

There are, nonetheless, several exceptions to the intent requirements. The first exception is that a person may be held criminally liable for murder when death

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<sup>195</sup> Ashworth, A., *Principles of Criminal Law*. 4<sup>th</sup> edn. Oxford: Oxford University Press, 2003, pp. 160-161.

<sup>196</sup> Reid, op. cit.

results from the commission of another offence. For example, a person who commits arson by setting fire to a house, causing death to its inhabitants, may be charged with both murder and arson.<sup>197</sup> In some cases, an employer may be vicariously held liable for criminal acts of their employees committed in the course of their work, even if the employer does not know that his/its employees are committing the criminal acts. In principle, though, vicarious liability ‘generally depends on the relevant offence being construed as one of strict liability or with a reverse-onus defence.’<sup>198</sup> In this regard, direct liability, which applies to traditional, *mens rea* offences, ‘renders the company liable only when a director or senior officer of the company has the appropriate knowledge to satisfy the mental element of the offence. In the case of manslaughter, gross negligence will satisfy the mental element.’<sup>199</sup>

As is the case with *mens rea*, defining *actus reus* is not easy; because it is ‘not a tightly defined concept but rather a loose “common denominator” which denotes the requirement that every crime requires an external element.’<sup>200</sup> In principle, the bedrock of the doctrine of *actus reus* is composed of acts, omissions and causes of criminal offences.<sup>201</sup> In other words, it is that element of the ‘definition of an offence which consists in the behaviour which the defendant engages in, seen from an external point of view: abstracted from its meaning or significance for the defendant herself.’<sup>202</sup>

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<sup>197</sup> Ibid, p. 10.

<sup>198</sup> Lacey, N. et al., *Reconstructing Criminal Law: Text and Materials*, op. cit, p. 665.

<sup>199</sup> Ibid, p. 666. See also the English case of *Tesco v Nattrass* [1972] AC 153.

<sup>200</sup> Norrie, A., *Crime, Reason and History*. London: Butterworths, 2001, p. 110.

<sup>201</sup> Ibid.

<sup>202</sup> Lacey, et al, op. cit, p. 44.

In some crimes, *actus reus* may consist simply in an action a piece of behaviour and in other cases, it may consist ‘wholly or partly in a particular result’s being caused, as in the case of murder and manslaughter – causing the death of a person – or causing death by dangerous driving.’<sup>203</sup> In criminal law, these are known as “result crimes.”<sup>204</sup>

### 2.3.3 Violation of the Elements of Criminal Law

For an accused of a crime to be convicted, *it is must be proved beyond reasonable doubt* that the accused has violated all elements of a crime as established by criminal law.<sup>205</sup> Indeed,

Establishing proof of any element may be difficult, but one of the most difficult is **causation**. In recent years the causation element has been a hindrance to prosecuting many of the charges brought against individuals who have engaged in sexual and other acts while infected with **acquired immune deficiency syndrome (AIDS)**, a deadly disease first discovered in 1979 and spreading rapidly throughout the world today.<sup>206</sup> [Emphasis in the original text].

This is at least the case in the US, where cases of both criminal and civil nature have been successfully litigated in courts of law against the culprits on HIV/AIDS causation. In the US, and certain other Commonwealth jurisdictions, some states have enacted laws providing that sexual acts engaged in by a person who knows that he or she has AIDS or is HIV positive and who does not tell the partner of that condition is a crime. For instance, the Michigan statute provides as follows:

- (1) A person who knows that he or she has been diagnosed as having acquired immunodeficiency syndrome or acquired immunodeficiency syndrome related complex, or who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has acquired immunodeficiency

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<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

<sup>205</sup> Reid, op. cit.

<sup>206</sup> Ibid.

- syndrome or acquired immunodeficiency syndrome related complex or is HIV infected, is guilty of a felony.
- (2) As used in this section, “sexual penetration” means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal opening of another person’s body, but emission of semen is not required.<sup>207</sup>

The Michigan statute was unsuccessfully challenged in 1998 in *Jensen v Michigan*<sup>208</sup> by a woman who had appealed against her convictions for knowing that she was HIV positive and engaging herself in sexual penetration without informing her partner of her HIV status. She was sentenced to concurrent terms of two years and eight months to four years of imprisonment on each of the three counts. On appeal, the Michigan Court of Appeals found that: ‘the HIV notice statute is neither unconstitutionally overbroad nor violative of defendant’s rights to privacy or against compelled speech.’<sup>209</sup>

In actual fact, to successfully prosecute cases of this nature; the prosecution must prove criminal intent on the part of the accused. For instance, in *Jensen* the court found criminal intent to be inherent in the socially and morally irresponsible actions of the defendant.

## 2.4 The Purpose of Criminal Law

From time immemorial criminal law has not been able to regulate all human behaviours *in toto*. However, the scope of criminal law has always been to offer some standards, goals, and guidelines to regulate human behaviours. This underlies

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<sup>207</sup> Mich. Comp. Laws, Section 333.5210 (2004).

<sup>208</sup> 586 N.W. 2d 748 (Mich. App. 1998).

<sup>209</sup> See also *Weeks v State*, 834 S.W. 2d 559 (Tex. App. 1992).

the choice of ‘a statement of what conduct is so important that it must be sanctioned by the state.’<sup>210</sup> In this sense,

The serious impact of criminal law should lead us to question what kinds of behaviour ought to be covered by its reach. For example, some people question the use of the criminal law to enforce wearing helmets while riding bicycles or motorcycles or wearing seat belts and shoulder straps in automobiles. ... (However) in *Atwater v City of Lago Vista*,<sup>211</sup> the U.S. Supreme Court ruled in favour of the police who arrested Gail Atwater, who was not wearing her seat belt in violation of a Texas statute that provided a maximum fine of \$50 for the offence, a misdemeanour.<sup>212</sup> In writing for the Supreme Court, Justice David Souter stated that although Atwater had suffered “gratuitous humiliations” and “pointless indignity” when she was arrested (with her children in the car), taken in handcuffs to the police station, and held in jail until she posted \$310 for bail, the police had the legal authority to make the arrest.<sup>213</sup>

So, this case (and many others that may be asked) raises the issue of how extensive the law should be. Basic questions that can be raised here are: ‘Would civil sanctions suffice? How should the law respond to activities such as same-gender sexual acts, prostitution, the use of alcohol or other drugs, and attempted suicide? In short, we are faced with the critical question of whether the criminal law should be used to regulate activities that may be considered religious, but not *legal* issues.’<sup>214</sup>

In a nutshell, though, the purpose of criminal law, as rationalised in the consensus-conflict perspective of criminology and sociology of law, is to prohibit or limit certain conducts that are deemed unacceptable by society ‘so that peace, safety and

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<sup>210</sup> Reid, op. cit, p. 15.

<sup>211</sup> 532 U.S. 318 (2001).

<sup>212</sup> In Tanzania the use of *misdemeanor* or *felony* to describe a type of a criminal offence is no longer in practice. But in the U.S. the use of *misdemeanor* and *felony* is still practiced. In the US, the two types of crimes ‘are distinguished primarily in terms of the sentences that may be imposed. Usually, a *felony* is a crime for which a person may be sentenced to death or to a long prison term, while a *misdemeanor* is a less serious offence for which a short jail term (less than a year), or a fine, a period of probation, or some other alternative to incarceration may be imposed.’ Reid, op. cit, p. 12.

<sup>213</sup> Ibid, p. 15.

<sup>214</sup> Ibid.

security can be guaranteed.’<sup>215</sup> Seen in this context, the goal of criminal justice is to ensure that violators of criminal law are punished, ‘so that the prevailing values and norms of society are protected, and harmony among individuals and groups is guaranteed and sustained. The provisions of criminal law, undoubtedly, embody religious, political, economic and socio-cultural values shared by a very significant proportion of the population in society.’<sup>216</sup>

In this case, criminal law is necessary in ensuring human beings live peaceful and in harmonious coexistence. For instance, without a criminal law provision prohibiting murder in modern society ‘social interaction and coexistence will be precarious.’<sup>217</sup>

However, this general goal of criminal law has been widely criticised by many scholars ‘as being indifferent to the diversity of groups in society and their divergent interests.’<sup>218</sup> For most scholars, criminal law may be coercive, exploitative and repressive in certain societies for the purpose of furthering certain interests of the powers that be. This was, for instance, true during colonialism in Africa whereby colonial rulers enacted laws and established criminal justice agencies that coerced, repressed and helped to exploit Africans.<sup>219</sup> Ironically, after independence most of Sub-Saharan African states retained these coercive, repressive and exploitative criminal justice systems as they were ‘found to be useful by the new ruling class,

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<sup>215</sup> Alemika, E.E.O., “Criminal Justice: Norms, Politics, Institutions, Processes and Constraints”, op. cit, p. 13.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

<sup>219</sup> Ibid. See also Shivji, I.G., “State and Constitutionalism in Africa: A New Democratic Perspective.” *International Journal of Sociology of Law*. 18, 1990, pp. 381-408; Alemika, E.E.O., “Colonialism, State and Policing in Nigeria.” *Crime, Law and Social Change*. Vol. 20, 1993, pp. 187-219; and Sumner, C. (ed.), *Crime, Justice and Underdevelopment*. London: Heinemann, 1982.

[however] the subordinate classes could only accept the arrangement from a position of weakness. Because post-colonial states are based on a very shaky foundation, coercion is more widely practiced compared to more stable developed countries.<sup>220</sup>

As Richard Bowd contends, the new African elite retained and continued to apply the coercive colonial criminal laws because throughout the period of colonialism it was these elites who had been tasked with the management of the country under supervision of a semi-absent landlord. In maintaining the existing systems, such elites ‘found themselves in advantageous position from which they could, with relative ease, ensure their position and consolidate their power: not always for the benefit of the populations they were meant to be serving.’<sup>221</sup>

This reality makes criminal law a subject of law which is not ‘a neutral instrument that treats and serves all citizens and groups equally.’<sup>222</sup> Critically viewed in this context, ‘criminal law embodies only selected concerns and values among the universe of moral norms differentially valued by different groups.’<sup>223</sup> Consequently, criminal codes disproportionately ‘embody the values and interests of the individual and groups that make criminal law, influence the enactment of law, or enforce and

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<sup>220</sup> Shaidi, L.P., “Traditional, Colonial and Present-day Administration of Criminal Justice.’ In Mushanga, T.M. (ed.), *Criminology in Africa*. UNICRI Series: Criminology in Developing Countries, Publication No. 47, 1992, p. 16.

<sup>221</sup> Bowd, R., “Status quo or Traditional Resurgence: What is Best for Africa’s Criminal Justice Systems?”, op. cit, p. 43.

<sup>222</sup> Alemika, E.E.O., “Criminal Justice: Norms, Politics, Institutions, Processes and Constraints”, op. cit, p. 13.

<sup>223</sup> Ibid, p. 14.

administer the criminal codes. Therefore, criminal law does not equally represent the interests of the various groups in society.’<sup>224</sup>

Conceptualised in a radical-conflict paradigm in criminology and sociology of law, ‘the social value which receive protection of the criminal law are ultimately those which are treasured by dominant interest groups’ in society.<sup>225</sup> In this context, criminal is predominantly used to ‘control the behaviours of the poor and powerless, especially those behaviours considered offensive by lawmakers and rulers.’<sup>226</sup>

## 2.5 The Nexus between Criminal Justice and Juvenile Justice

As we have seen in the preceding section, criminal law aims at controlling unacceptable behaviour with a view to ensuring and restoring order and harmony in society. In this sense, criminal law is a sub-sector of criminal justice. Within the criminal justice system there is yet another emerging subset: juvenile justice. As will be discussed in Chapter 4 of this work, the concept and practice of juvenile justice derived from developments in the criminal justice system in the 19<sup>th</sup> century after the first juvenile court was established in Chicago in 1899.<sup>227</sup> Historically speaking, prior

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<sup>224</sup> Ibid.

<sup>225</sup> Sellin, T., *Culture, Conflict and Crime*. New York: Social Science Research Council, 1938, pp. 21-22.

<sup>226</sup> Alemika, E.E.O. Op. cit, p. 14. See also Chambliss, W.J., *Crime and the Legal Process*. New York: McGraw Hill, 1969; Bowden, T., *Beyond the Limits of the Law*. Harmondsworth: Penguin, 1978; and Blumberg, A.S., *Criminal Justice: Issues and Ironies*. 2<sup>nd</sup> edn. New York: New Viewpoints, 1974.

<sup>227</sup> For a detailed account of the early development of the juvenile courts in the US, see particularly Pitts, J., “Youth Justice in England and Wales”, op. cit; Butts, J.A., “Can we do Without Juvenile Justice?”, op. cit; Shepherd, R.E., Jr., “Still Seeking the Promise of Gault: Juveniles and the Right to Counsel”, op. cit; Inciardi, J., *Criminal Justice*, op. cit; Pickett, R.S., *House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857*, op. cit; Regoli, R.M. and J.D. Hewitt, *Delinquency in Society*, op. cit; Odongo, G.O., “The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context”, op. cit; Hoghuhi, M., “The Juvenile Delinquent has Become the Demon of the Twentieth Century”, op. cit; and Steinberg, L., “Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question”, op. cit.



to the juvenile court's invention, the system for controlling juvenile delinquents 'was contained within the general criminal justice system which meted out to children or adolescents above a certain age the same criminal justice rules or procedures as adults with little or no differentiation or reduction of the applicable punishment measures.'<sup>228</sup>

In England,<sup>229</sup> the juvenile justice system was first embedded in the concept of youth justice that was for the first time introduced in England and Wales through the 1854 Youth Offenders Act. Through this law, there emerged a practice by which 'children and young people under 16 could be transferred on completion of a sentence in an adult jail.'<sup>230</sup> With this law, there were established Industrial Schools for 7-14 year olds convicted of vagrancy.<sup>231</sup> As was the case in the US, in the UK throughout the 19<sup>th</sup> century there were widespread public and media concerns about the perceived "crisis of control" of the justice system as a result of corruption, brutality and indiscipline to which children were exposed in adult jails. This led to a shift in approach from a criminal justice system that sought to punish children and young people convicted for crimes to treatment and the need for alternatives to custody.<sup>232</sup>

In both the US and the UK, the responsibility for this new form of children and youth justice in the criminal justice system was placed 'in the hands of a new legal and

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<sup>228</sup> Odongo, *ibid*, p. 18.

<sup>229</sup> Tanzania is a common law country, whose legal system follows the English model of common law.

<sup>230</sup> Pitts, *op. cit*, p. 71.

<sup>231</sup> Newburn, T., *Crime and Criminal Justice Policy*. London: Longman. 1995.

<sup>232</sup> Pitts, *op. cit*, p. 73.

administrative entity, the juvenile court.’<sup>233</sup> Pitts points out that by 1910 separate juvenile courts with distinct and discrete institutional and administrative machinery for dealing with young offenders had been established in most Western European countries.<sup>234</sup> As Platt argues, before the establishment of the juvenile the court in Western Europe and the US the criminal justice system had only young offenders, who were normally of the apparent higher ages above juveniles.<sup>235</sup>

With this development, the criminal justice system had to start entertaining the superiority of the principle of the welfare of the offending children as opposed to justice: the shift from the “deeds” of the child to his or her “needs” in the criminal justice system. In England and Wales, the Children and Young Persons Act (1933) established the principle that children and young offenders ‘should be dealt with in ways that promoted their “welfare” and that any necessary “treatment” should be available to them.’<sup>236</sup> According to Pitts, the Act ‘also formally abolished capital punishment for those under the age of 18, and consolidated the nineteenth century reformatories and Industrial Schools into a national system of Approved Schools for the treatment of young offenders aged 10-15.’<sup>237</sup>

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<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

<sup>235</sup> Platt, A., *The Childsavers*. Chicago: Chicago University Press, 1969.

<sup>236</sup> Pitts, op. cit, p. 76. The doctrine of “welfarism” in juvenile justice is elaborated at length in Chapter 4 below.

<sup>237</sup> Ibid, p. 43.

<sup>237</sup> Alemika, E.E.O., “Criminal Justice: Norms, Politics, Institutions, Processes and Constraints”, op. cit, p. 21.

From this analysis, there is an historical linkage between the emergence and development of juvenile justice from within the criminal justice system, making the former part and parcel of the latter.

## **2.6 The Place of Human Rights and Juvenile Justice in the Administration of the Criminal Justice System**

The discussion in the previous sections in this Chapter is premised around the concept of criminal justice and its role in the control of social behaviour of members of society. The conceptual hypothesis ensuing from this discussion is summed thus: the criminal justice system is a tripartite arrangement involving the allocation of entitlements and deprivations that are due to or deserved by those who commit criminal offences, victims of those offences and the society at large. Contextualized in this *nous*, the operation of the criminal justice system is seen as an ‘amalgam of loosely coupled subsystems sequentially involved in law making, law enforcement and policing, prosecution, judgment and sentencing, administration of penal sanctions and correctional programmes.’<sup>238</sup>

However, the operations of these subsystems are normally poorly coordinated; producing diverse results, some of which may be deemed, or are actually, unjust.<sup>239</sup> In order to minimize the injustices in the criminal justice system, due to this poor coordination of subsystems, international standards have been put in place to regulate the administration of the criminal justice system. These include the human rights norms that require the system to observe a number of basic rights and freedoms as

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<sup>238</sup> Ibid.

<sup>239</sup> Blumberg, A.S., *Criminal Justice: Issues and Ironies*, op. cit.

well as juvenile justice in the administration of the criminal justice system. Therefore, in this section we discuss the role of human rights and juvenile justice principles and standards in controlling injustices in the administration of the criminal justice system.

The synergy between criminal justice and human rights was made clear over 150 years when the doctrine of “due process” was given more weight in the English criminal justice system. This was made possible ‘by the expansion of criminal law’s scope and by liberal ideas about the rights of individuals *vis-à-vis* the state.’<sup>240</sup> The doctrine of due process ‘emphasizes the need to protect procedural rights [in the criminal justice system] even if this prevents the legal system from operating with maximum efficiency.’<sup>241</sup> This move, which propounds the philosophical school of thought on criminal punishment based on “deontological” or “rights-based” theories, was a significant departure from the “consequentialist” theories of criminal punishment. While the latter emphasises that criminal justice’s punishment should bring about “good consequence” – i.e. criminal punishment should result in reduction in crime – the former insists that ‘an offender should be punished only after he has been found guilty in a fair procedure respecting rights of due process, and only in proportion to his “just deserts.”’<sup>242</sup>

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<sup>240</sup> Lacey, et al, *Reconstructing Criminal Law: Text and Materials*, op. cit, p.15.

<sup>241</sup> Inciardi, op. cit, p. 13.

<sup>242</sup> Roberts, P. and A. Zuckerman, *Criminal Evidence*. New York: Oxford University Press, 2004, pp. 10-11. See also von Hirsch, A., *Censure and Sanctions*. Oxford: Oxford University Press, 1993; Duff, R.A, *Punishment, Communication and Community*. Oxford: Oxford University Press, 2001; Ashworth, A., *Sentencing and Criminal Justice*. 3<sup>rd</sup> edn. London: Butterworths, 2000; Ten, C.L., *Crime, Guilt and Punishment*. Oxford: Oxford University Press, 1987; and von Hirsch, A., *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals*. Manchester: Manchester University Press, 1986.

Ever since, international norms have evolved to guarantee individual criminal suspects' rights in the administration of criminal justice against injustices. These basic rights include the right to be presumed innocent until otherwise proved by a court of competent jurisdiction and in accordance with the law. For instance, Article 11(1) of the Universal Declaration of Human Rights (UDHR) of 1948 provides that every person 'charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantee necessary for his defence.'

This principle has been reiterated in many subsequent human rights instruments adopted by the UN as well as regional bodies such as the AU and the EU. In this context, Article 9 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 provides a very expansive enumeration of the rights of persons accused of committing criminal offences. For instance, it enumerates that every person has the right to liberty and security of person. In this context, no one shall be subject to arbitrary arrest or detention; no one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. The article also provides that anyone who is arrested shall be informed, at the time of his arrest, of the reasons for his arrest and shall be promptly informed of any charges against him; whereby he should be promptly brought before a judge or magistrate or other legally authorised officer to be tried within a reasonable time. The article further stresses that the detention of those arrested or awaiting trial should be an exception, not the general rule.

In Article 10, the ICCPR obliges States Parties thereto to ensure that all persons deprived of their liberty *shall be treated with humanity and with respect for the inherent dignity of human persons*. The article stresses that accused persons shall, save in exceptional circumstances, be segregated from convicted persons; and shall be subjected to separate treatment appropriate to their status as unconvicted persons. In addition, the article emphasises that accused juveniles shall be separated from adults and brought, as speedily as possible, for adjudication.

Besides, Article 7 of the African Charter on Human and Peoples' Rights (ACHPR)<sup>243</sup> provides that: 'every individual shall have the right to be presumed innocent until proven guilty by competent court or tribunal.' As Alemika observes,

The importance of the idea of "presumption of innocence" is that the deprivation of the human rights of and imposition of punishment on an innocent person constitutes criminal injustice. One of the main implications of the presumption is that suspects should be treated as if they were innocent, and accorded their rights until their guilt has been determined or established through due process by a competent and impartial court or tribunal.<sup>244</sup>

There is also another right that international norms have developed in the administration of criminal justice. This is the right to a fair trial. Under Article 14 of the ICCPR, for instance, it is provided that every person accused of offending criminal law shall have the right to a fair trial and a public hearing by a competent, independent and impartial tribunal established by, and acting in accordance with the, law.

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<sup>243</sup> Adopted by the OAU in 1981 and came into force in October 1986.

<sup>244</sup> Alemika, E.E.O. "Criminal Justice: Norms, Politics, Institutions, Processes and Constraints", op. cit, p. 17.

Another right in this regard is the right not to be subjected to torture or any form of cruel or degrading treatment. In most developed jurisdictions, like the UK, national legislation have incorporated<sup>245</sup> these rights and constantly and increasingly expanded on the jurisprudence of those countries. For instance, the UK enacted the Human Rights Act in 1998 ‘with the object of making the European Convention on Human Rights (ECHR) and its associated jurisprudence – primarily the decisions of the European Court of Human Rights (ECtHR)<sup>246</sup> – a source of rights and duties in English proceedings, including criminal proceedings.’<sup>247</sup> In this regard, the English Human Rights Act has incorporated all “Convention rights” in the ECHR relating to the administration of criminal justice. These include: prohibition on torture and inhuman or degrading treatment;<sup>248</sup> non-retroactivity of penal law;<sup>249</sup> freedom from unlawful deprivation of liberty;<sup>250</sup> and the right to respect for private life.<sup>251</sup> The English Human Rights Act also sets the substantive right to a fair trial enumerated in

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<sup>245</sup> According to Roberts and Zuckerman, ‘The 1998 [Human Rights] Act does not entrench the ECHR, or even strictly speaking “incorporate” it into English law. The Act, instead, strikes a rather subtle constitutional balance, under which all of the ECHR’s substantive rights are re-enacted as unique provisions of English law, known as “Convention rights,” and English judges are directed to have regard to the jurisprudence of the ECtHR, without ostensibly affecting the absolute sovereignty of Parliament.’ See Roberts, P. and A. Zuckerman, op. cit, p. 33.

<sup>246</sup> Section 2 of the English Human Rights Act (1998) provides that: ‘A court or tribunal determining a question which has arisen in connection with a Convention right must take into account any: (a) judgment, decision, declaration or advisory opinion of the European Court of Human Rights; (b) opinion of the Commission ... (c) decision of the Commission ..., or (d) decision of the Committee of Ministers ... whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen.’

<sup>247</sup> Roberts, P. and A. Zuckerman, op. cit, pp. 32-33. See also Wadham, J. and H. Mountfield, *Blackstone’s Guide to the Human Rights Act 1998*. London: Blackstone, 1999; and Emmerson, B. and A. Ashworth, *Human Rights and Criminal Justice*. London: Sweet & Maxwell, 2000.

<sup>248</sup> Article 3 of the ECHR.

<sup>249</sup> Ibid, Article 7.

<sup>250</sup> Ibid, Article 5.

<sup>251</sup> Ibid, Article 8.

Article 6 of the ECHR is provided *in extenso*, giving it ‘extensive evidentiary applications that English criminal lawyers have only just begun to exploit.’<sup>252</sup>

Apart from the foregoing rights to which accused or convicted persons are entitled in the criminal justice system, Article 14 of the ICCPR catalogues the following minimum guarantees to which such persons are entitled: first, to be promptly informed and in detail in a language which he understands, of the nature and cause of the charge against him. Second, to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his choosing. Third, to be tried without undue delay. Fourth, to have a legal counsel as well as well as free assistance of an interpreter if he does not understand or speak the language used in court.

Other rights inherent in the administration of the criminal justice system include the need to have child-friendly procedures in criminal cases involving children, taking into account their age and the desirability of promoting their rehabilitation into good citizens. The Article also emphasises the need for the right of appeal or review or revision of a sentence and conviction by a higher court in the criminal justice system.

From the international norms, many constitutions, including those of Sub-Saharan African countries, have entrenched these rights. In the same vein, the Constitution of the United Republic of Tanzania has enumerated these basic rights in Article 12 (rights of equality and dignity of the person); Article 13 (rights of equality before the

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<sup>252</sup> Roberts, and Zuckerman, op. cit, p. 33.



law, fair trial, appeal, presumption of innocence, and prohibition of discrimination and torture/degrading treatment); Article 14 (the right to life); and Article 16 (the right to privacy).

As it can be gathered from the explanation above, the international norms for the administration of criminal justice strive to invoke human rights standards and fairness of criminal trials in the context of the rule of law or principle of legality and the presumption of innocence.<sup>253</sup> Seen in this context,

The ideals of the rule of law and of due process captured in Articles 5, 6 and 7 of the ECHR have a special significance for criminal law: both the legitimacy of substantive criminal laws and fairness of the procedures through which they are enforced are seen especially important given criminal law's distinctively coercive methods. The rule of law is generally conceived in terms of a cluster of procedural requirements: laws should be consistent, of general application, certain in their effects, clear, publicised and prospective rather than retrospective in application.<sup>254</sup>

In addition, these requirements are 'combined with the principle of equality before the law – the idea that all citizens, including rulers or lawmakers, should be subject to law – and with the principle of legality – the idea that laws should be created in accordance with the constitutional procedure.'<sup>255</sup> In this sense, these 'norms of human rights are aimed at ensuring that innocent persons are not convicted or punished. They are also intended to ensure that the human dignity of a convicted person is not violated through cruel and degrading treatment.'<sup>256</sup>

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<sup>253</sup> Alemika, E.E.O. "Criminal Justice: Norms, Politics, Institutions, Processes and Constraints", *op. cit.*, p. 20.

<sup>254</sup> Lacey, et al, *op. cit.*, pp. 16-17.

<sup>255</sup> *Ibid.*, p. 17.

<sup>256</sup> Alemika, *op. cit.*

Therefore, it is trite that any criminal justice system should incorporate human rights as well as juvenile justice principles and norms in order for it to comply with the doctrine of rule of law and human rights. This underscores the need to place human rights and juvenile justice high at the agenda of administration of the criminal justice system in a country, including Tanzania.

## **2.7 Conclusion**

This Chapter has examined and traced the genesis of the criminal law; the main attributes of criminal law; and the nexus between criminal law and justice. The Chapter also has explored the essence of criminal law in justice; the nexus between criminal justice and human rights and juvenile justice. The rationale for this Chapter was to lay down a synergy that exists between the concept of justice, human rights, criminal justice and juvenile justice, which form the basis upon which this study is founded.

## CHAPTER THREE

### 3.0 THE EVOLUTION OF JUVENILE JUSTICE

#### 3.1 Introduction

The adoption of the UN Convention on the Rights of the Child (CRC) in 1989 and the African Charter on the Rights and Welfare of the Child (ACRWC) in 1990 has revolutionised the conception of juvenile justice worldwide. The two instruments have resulted in a radical shift from the doctrine of *parens patriae* – “the state as parent” – and the paternalistic approach to rehabilitating children in conflict with the law to modern day conception of juvenile justice that combine welfarism and child justice resulting in *reintegration* of offending children back to society. From the early conception of juvenile justice in the US and Western Europe which insisted on the needs as opposed to deeds of the offending child, the CRC and the ACRWC have brought about the importance of the child’s rights in the administration of juvenile justice.

Before the two instruments were adopted in the late 20<sup>th</sup> century, there were other international instruments relating to children’s rights<sup>257</sup> that contained provisions which ‘were protectionist and welfare orientated in character.’<sup>258</sup> In the texts of these instruments the tone of the rights was that the child was ‘not in a position to exercise his own rights; adults exercised them in place of the child and in doing so were

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<sup>257</sup> In particular, the Geneva Declaration of the Rights of the Child, adopted by the League of Nations in 1924; and a number of ILO Conventions relating to labour standards for working children adopted since 1919 (*See* particularly ILO Convention on Forced Labour, No. 29 of 1930; ILO Convention on Abolition of Forced Labour, No. 105 of 1957; ILO Convention on Equal Remuneration, No. 100 of 1951; ILO Convention on Discrimination, Employment and Occupation, No. 111 of 1958; and ILO Convention on Minimum Age, No. 138 of 1973). *See* also ILO Convention on Worst Forms of Child Labour, No. 182 of 1999.

<sup>258</sup> Tomkin, J., *Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned – A Legal Analysis*. Geneva: Quaker United Nations Office, 2009, p. 11.

subject to certain obligations. Thus it could be said that a child had special legal status resulting from his inability to exercise his rights.<sup>259</sup> This early perception of children's rights was given judicial underpinning in a 1979 Irish case of the *State (M) v The Attorney General*<sup>260</sup>, where the Irish Supreme Court recalled that:

... the courts have consistently construed the right of liberty of [a child], as being a right which can be exercised not by its own choice (which it is incapable of making) but by the choice of its parent, parents or legal guardian, subject always to the right of the courts in appropriate proceedings to deny that choice in the dominant interest of the welfare of the child.

However, the rights of child subsequently and gradually evolved towards “empowering the child”; and, with the adoption of the CRC and the ACRWC, there has been a clear move ‘towards recognising that the child is an active holder of rights and not merely a passive object of the rights bestowed upon her or him’.<sup>261</sup>

This Chapter, therefore, discusses the administration of modern juvenile justice in the historical context. The Chapter begins by tracing the state of the rights of children in conflict with the law in the pre-juvenile justice era, where a brief review of the history of children's rights as well as a prelude to modern juvenile justice at common law are provided. In this regard, it is noted that children who committed crimes in early common law were not given any special treatment because they were considered as adults. At common law, for instance, the minimum age of criminal responsibility was set as young as seven years, and children guilty of crimes were imprisoned. It is also observed that the principle of the best interests of the child or

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<sup>259</sup> This statement was made by a French delegate to the Commission on Human Rights in 1959 and is quoted in Veerman, P., *The Rights of the Child and the Changing Image of Childhood*. Dordrecht: Nijhoff, 1992, p. 164.

<sup>260</sup> [1979] IR 73.

<sup>261</sup> Tomkin, op. cit.

“the child’s welfare” was recognised by the common law courts in the early twentieth century.<sup>262</sup>

The Chapter further traces the conception of the juvenile justice system in the late 1800s, which strived to reform US policies regarding youth offenders. Prior to this period, misbehaving juveniles in the US, like in other parts of Western Europe, often faced arrest by the police, initial placement in the local jail with adults, and eventual institutionalisation in a house of refuge or workhouse.<sup>263</sup> The Chapter argues that in the US, juvenile justice in its earliest form was conceived and developed out of the need for a separate court for child offenders, away from the ordinary courts that dealt with offending adults. So, the first juvenile court was established in Cook County under the 1899 Illinois Juvenile Court Act; and by 1945 every State in the US had a juvenile court. From the early 20<sup>th</sup> century, the juvenile court was transplanted to Western Europe; and in England, it was given legal recognition through the enactment of juvenile justice-specific legislation.<sup>264</sup>

The Chapter analyses the three models of juvenile justice from its inception – the welfarism, back to justice and corporatism – as they have impacted on the development of modern day juvenile justice. The Chapter finally discusses modern-

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<sup>262</sup> Rios-Kohn, R., “Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries.” In United Nations Children Fund, *Protecting the World’s Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems*. New York: Cambridge University Press, 2007, pp. 34-99, p. 39.

<sup>263</sup> Inciardi, J., *Criminal Justice*. 7<sup>th</sup> edn. New York/Oxford: Oxford University Press, 2002, p. 638. See also Pickett, R.S., *House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857*. Syracuse: Syracuse University Press, 1969.

<sup>264</sup> Pitts, J., “Youth Justice in England and Wales.” In Mathews, R. and J. Young (eds.), *The New Politics of Crime and Punishment*. Devon, UK: William Publishing, 2003.

day administration of juvenile justice in the context of the CRC and the ACRWC, particularly in African.

### **3.2 The State of the Rights of Children in Conflict with the Law in the Pre-Juvenile Justice Era**

This section discusses the state of the rights of children in conflict with the law before the concept of juvenile justice emerged. It argues that during this period, children in conflict with the law were treated in the same manner as adult offenders.

#### **3.2.1 A Briefly Overview of the History of Children's Rights**

In order to understand the contemporary trends in the administration of juvenile justice worldwide it is important to briefly review the history of children's rights. Modern conceptions of the rights of the child could be embedded in the reasoning of the early 20<sup>th</sup> century Polish pedagogue, Janusz Korczak,<sup>265</sup> who opined that: 'Children are not made human beings, they are born human beings.'<sup>266</sup> Historically speaking, children's rights were not recognised under the common law until around the seventeenth century.<sup>267</sup> During this period and before, in most of the European countries, 'the special nature of children was ignored and children were treated as miniature adults.'<sup>268</sup> As British legal theory historians have indicated, the historical

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<sup>265</sup> Dr. Janusz Korczak was a writer, educator, founder of an original system of education, and patron of children.

<sup>266</sup> Quoted in Nowak, M., *Introduction to the International Human Rights Regime*. Leiden/Boston: Martinus Nijhoff Publishers, 2003, p. 91.

<sup>267</sup> Rios-Kohn, R., "Comparative Study of the Impact of the Convention on the Rights of the Child: Law Reform in Selected Common Law Countries", op. cit, p. 39.

<sup>268</sup> Flekkoy, M. and N. Hevener Kaufman, op. cit, p. 15.

origins of the British common law system actually reveal a ‘brutal indifference to a child’s fate.’<sup>269</sup>

According to Rebecca Rios-Kohn: ‘It is well documented that until approximately the nineteenth century, children were treated like property or chattel but were valued by their families for their contributions through their work.’<sup>270</sup> This approach to children’s rights and welfare was well articulated by Blackstone to the effect that the father might ‘indeed have the benefit of his children’s labour while they live[d] with him, and [were] maintained by him: but this [was] no more than [the father was] entitled to from his apprentices or servants.’<sup>271</sup> It is worthy noting that,

Although the principle of the best interests of the child has deep Anglo-Saxon roots, a review of the historical development of parenthood and childhood under early common law shows that the notion of children’s rights did not exist whatsoever. Children had a low status within society and within the family. The law, which usually reflects the values and traditions of a society, treated them accordingly.<sup>272</sup>

Therefore, at common law children were treated as are treated in most developing countries today, where they are ‘forced to work as a result of their level of poverty. Child labour was not only acceptable, but it also was promoted at the highest level; for example, by Parliament, which stated that a working child was more useful to his family.’<sup>273</sup> As it is the case in most developing countries today, it was justified by society’s perception ‘that for those children of the lower classes, education was not necessary as child labourers were deemed essential to the country’s economy. Thus, the vast majority of working children had very little schooling. In 1840, only 20 per

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<sup>269</sup> Rios-Kohn, op. cit.

<sup>270</sup> Ibid.

<sup>271</sup> See Blackstone, W., *Commentaries on the Laws of England*. Oxford: Clarendon Press, Book I, Ch. 16. Originally published in 1765-1769.

<sup>272</sup> Rios-Kohn, op. cit, pp. 39-40.

<sup>273</sup> Ibid.

cent of children had gone to school and, finally, in 1870, the Education Act was passed in England, requiring all children between the ages of five and ten to attend school.<sup>274</sup>

### 3.2.2 Prelude to Modern Juvenile Justice

Perceived in the foregoing context, children who committed crimes in early common law were not given any special treatment because they were considered as adults. At common law, for instance, the minimum age of criminal responsibility was set as young as seven years, ‘and children guilty of crimes were imprisoned.’<sup>275</sup> Indeed,

The harshness of the laws at that time is illustrated by the Stubborn Child Statute enacted by the State of Massachusetts in 1646, which provided that a stubborn or rebellious son above 15 years of age could be put to death pursuant to a complaint submitted by the child’s parents. According to historical records, children were hanged as 1708 and the notion of a juvenile court for the juvenile offenders only emerged in the late twentieth century.<sup>276</sup>

This kind of treatment offered to children at early common law was akin to treating children as if they were invisible. It was this perception of children that made some states in England and the US to enact ‘laws protecting animals from cruelty before they would enact legislation to protect children from abuse.’<sup>277</sup> This mistreatment of children in the early common law was exemplified in the famous case labelled as the “Mary Ellen Affair.” Thus,

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<sup>274</sup> Ibid, p. 40.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid.

<sup>277</sup> Ibid. Actually, according to a British participant at an NGO Forum on the CRC held at the NGO Group’s premise in Geneva, Switzerland, on 10<sup>th</sup> June 2008, England still retains the tendency of valuing animals’ protection than children’s rights (the researcher attended this meeting and has, on file, personal notes of the meeting). In Tanzania a law for protecting animals (i.e. Animal Act) was enacted in 2008 while a law protecting children’s rights (i.e. the Law of the Child Act) was enacted a year later in 2009.



In this 1874 case that occurred in New York City, a child's parents were prosecuted for keeping their daughter chained to a bed and fed only bread and water. Because of the absence of legal protection for children at the time, the prosecutors were forced to draw an analogy with a law for the prevention of cruelty against animals.<sup>278</sup>

This kind of treatment of children in both the UK and US prompted wide criticism amongst children's rights reformers, leading amongst whom were Jane Adams and her fellow progressive reformers who, together with the Chicago Bar Association, convinced the Illinois legislature to establish a separate court on Cook County. The juvenile court, created under the 1899 Illinois Juvenile Court Act, was among other things intended to deal with troubled children 'in a more benign setting than the criminal courts.'<sup>279</sup> In the beginning, the 'mission of the juvenile court was to help young law violators get back on the right track, not simply to punish their illegal behaviour.'<sup>280</sup>

Therefore, the principle of the best interests of the child or "the child's welfare" was recognised by the common law courts in the early twentieth century. However, the same courts did not recognise the existence of a legal relationship between parent and child where the child was born out of wedlock. As Rebecca Rios-Kohn contends,

At common law, a child born to a woman outside of marriage was regarded as a *filius nullius*, or bastard, and had few rights. As Blackstone noted, "he can inherit nothing, being looked upon as a child of nobody." The mother had no parental rights but had a duty to support the child. At the same time the father of a child born outside of marriage could not acquire parental rights nor had any legal duties in

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<sup>278</sup> Ibid. See also *Encyclopedia Britannica*, "Human Rights." Available at [www.britanica.com/eb/article-1906289/human-rights](http://www.britanica.com/eb/article-1906289/human-rights) (accessed 14 June 2008).

<sup>279</sup> Shepherd, R.E., Jr., "Still Seeking the Promise of Gault: Juveniles and the Right to Counsel." *Criminal Justice Magazine*. Vol.15 Issue 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html](http://www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html) (accessed 6 January 2011).

<sup>280</sup> Butts, J.A., "Can we do Without Juvenile Justice?" *Criminal Justice Magazine*. Vol.15 No. 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/15-1jb.html](http://www.abanet.org/crimjust/juvjus/cjmag/15-1jb.html) (accessed 6 January 2011).

relation to the child's upbringing and well-being. Under the English common law, all children born before matrimony were deemed bastards by the law.<sup>281</sup>

The above quoted Blackstone's reasoning aimed at justifying 'the common law's refusal to grant children born outside of marriage legitimate status even if subsequent to their birth the parents became legally married. This view reflects the way the laws were drafted at the time, to protect certain societal interests but not necessarily those of the child's.'<sup>282</sup>

### 3.3 The History and Emergency of a Juvenile Court

In order to understand the contemporary trends in the administration of juvenile justice system worldwide it is crucial to take into account how the system has progressed since its inception at the global level.<sup>283</sup> The juvenile justice system was created in the late 1800s to reform US policies regarding youth offenders. Prior to the 20<sup>th</sup> century, 'misbehaving juveniles often faced arrest by the police, initial placement in the local jail with adults, and eventual institutionalisation in a house of refuge<sup>284</sup> or workhouse.'<sup>285</sup> Historically,

While recognising that children were different from adults in many ways, the [criminal justice] system failed to provide safeguards for [children] that are taken for granted today. During the last two decades of the 19<sup>th</sup> century and the early years

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<sup>281</sup> Rios-Kohn, op. cit, p. 41.

<sup>282</sup> Ibid.

<sup>283</sup> See particularly, Butts, J.A., "Can we do Without Juvenile Justice," op. cit; Shepherd, R.E., Jr., "Still Seeking the Promise of Gault: Juveniles and the Right to Counsel," op. cit; Hoghuhi, M., "The Juvenile Delinquent has Become the Demon of the Twentieth Century." In Hoghuhi, M., *The Delinquent: Directions for Social Control*. London: Burnet Books 13, 1983; and Steinberg, L., "Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question." *Criminal Justice Magazine*. Vol.18 No. 3, 2003. Available at [www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html](http://www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html) (accessed 13 January 2012).

<sup>284</sup> Especially noteworthy was the New York City's *House of Refuge*, established in 1825 'as the first systematic attempt to separate juvenile offenders from adult criminals and to provide "correction" rather than punishment.' Inciardi, J., *Criminal Justice*. 7<sup>th</sup> edn. New York/Oxford: Oxford University Press, 2002. p. 638. See also Pickett, R.S., *House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857*. Syracuse: Syracuse University Press, 1969.

<sup>285</sup> Regoli, R.M. and J.D. Hewitt, *Delinquency in Society*. 4<sup>th</sup> edn. Boston: McGraw-Hill, 2000, p. 358.

of the 20<sup>th</sup> century, the child-saving movement defined juvenile delinquency as a social problem. With that movement came reforms in police departments, courts, and correctional institutions, as well as the creation of a complex juvenile justice system.<sup>286</sup>

In the US, juvenile justice in its earliest form was conceived and developed out of the need for a separate court for child offenders, away from the ordinary courts that dealt with offending adults. With the creation of a separate juvenile court system, the contemporary ideals and principles of juvenile justice were hatched, nurtured and developed beyond the borders of the US.

### **3.3.1 The Need for, and Purpose of, a Separate Juvenile Court in the US**

Indeed, this reform of the criminal justice system was founded on a reform concept which asserted that, ‘children are different from adults, and the juvenile justice system should reflect these differences.’<sup>287</sup> Recognising that young people may be less culpable than adults and more amenable to change, ‘reformers acknowledged society’s responsibility to protect children and created a system whose central tenets were not punishment and retribution, but protection, treatment, and rehabilitation.’<sup>288</sup>

It was upon this foundation that the first juvenile court was established in Cook County under the 1899 Illinois Juvenile Court Act.<sup>289</sup> Therefore, the original juvenile court was ‘based on the notion that children were different from adults; that rehabilitation was possible and more important than punishment; that most children were redeemable; and that judges, making individualised decisions about children,

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<sup>286</sup> Ibid.

<sup>287</sup> Steinberg, op. cit.

<sup>288</sup> Ibid.

<sup>289</sup> Shepherd, Jr, op. cit.

could best determine whether the juvenile or adult court was the appropriate forum to prosecute a case.’<sup>290</sup> So, within a short period after the first juvenile court was established in Cook County, Chicago, ‘specialised juvenile courts existed in every state in the United States and throughout Western Europe.’<sup>291</sup> By 1945, there was a juvenile court in every state in the US.<sup>292</sup>

### 3.3.2 Early Dominant Theories in Juvenile Justice: *Parens Patriae* and ‘Welfarism’

When the early reforms in the processing and treatment of juvenile offenders took place in Chicago and later in all states in the US in the latter part of the 19<sup>th</sup> century, there was an ‘increasing awareness that the roots of crime and delinquency were not necessary to be found within individual offenders but, rather, were products of the culture and environment in which they lived.’<sup>293</sup> Coupled with the hitherto concern over the abuse and neglect of children both in and out of criminal justice’s penal institutions in the US, the new juvenile justice values emerged ‘based on the already established concept of *parens patriae*.’<sup>294</sup>

The concept of *parens patriae* – meaning, “the state as parent” – was first developed at common law in England, where the Court of Chancery had the power to intervene in property matters to protect the rights of children. With the emergency of the new juvenile justice philosophy in the US, this jurisdictional focus was expanded to

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<sup>290</sup> Mlyniec, W.J., “The Special Issues of Juvenile Justice: An Introduction.” *Criminal Justice Magazine*. Vol.15 No. 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/15-1myl.html](http://www.abanet.org/crimjust/juvjus/cjmag/15-1myl.html) (accessed 13 January 2012).

<sup>291</sup> Ibid.

<sup>292</sup> Inciardi, J., *Criminal Justice*, op. cit, p. 639.

<sup>293</sup> Inciardi, J., *Criminal Justice*, op. cit, p. 638.

<sup>294</sup> Ibid.

include the managing of “dependent and neglected” children. In this regard, the US court intervention ‘was justified by the theory that such child’s natural protectors – the parents – were unable or unwilling to provide an appropriate level of care.’<sup>295</sup> In order to atone this situation, the court had to take the place of parents – i.e. *parens patriae* – by providing specific protection to dependent and neglected children, most of whom were juvenile delinquents. This took the form of merging the concept of *parens patriae* with the medical model of treatment ‘to establish a system of juvenile justice designed to reform and rehabilitate young offenders.’<sup>296</sup> In this context,

The underlying philosophy was that if a child “went astray,” it was the *parents* who had failed. The court could take over the role of the parent, diagnose the problem, and prescribe the appropriate treatment. It did not matter what the child had done. His or her deviant behaviour was merely a symptom of the problem. The duty of the court was not to blame the child or determine guilt, but to identify and treat the underlying problem.<sup>297</sup>

Furthermore, the court had to consider the young offender’s welfare as its central concern. This would serve two purposes: one, it would protect the future of the child; and, two, it would permit an informal court process ‘that considered the entire history and background of the child’s difficulties, without being hampered by the limitations and requirements of official criminal procedure.’<sup>298</sup> In the end, this would make the juvenile processing a civil rather than a criminal matter.

When the first propagandists for the reform of the criminal justice towards juvenile justice emerged in the US – popularly known as “child savers”<sup>299</sup> – and later in

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<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> Ibid.

<sup>298</sup> Ibid.

<sup>299</sup> Child savers included penologists, philanthropists, and women’s organisations.

Western Europe, the early and dominant model was the welfare theory.<sup>300</sup> This theory provided the rationale for the approach to children deemed to be delinquent.<sup>301</sup> The advocates for the welfare theory asserted that ‘because the “welfare” of young offenders should be a paramount consideration, [child] offenders should, wherever possible, be dealt with by experts in the care and protection of children and young people.’<sup>302</sup> This assertion was contrary to the argument advanced by conservative politicians, senior police officers, magistrates and judges in the US and Western Europe, ‘who wished to retain a strong element of retribution in the youth justice system.’<sup>303</sup>

As was the case with the concept of *parens patriae*, under the welfare theory ‘courts assumed an important role in protecting a child.’<sup>304</sup> Seen in this context,

Welfarism advocated for a separate justice system for juveniles. At the heart of such a system was a social construction of childhood under which children were perceived as immature, both mentally and socially. Indeed, the prevailing philosophy underlying the original idea of a juvenile court was that rather than use criminal punishment to address children’s violations of the law, children were to be nurtured and given guidance with a view to making them responsible adults. Thus, welfarism was informed by a desire to be benign as manifested in the general role of the state as *parens patriae*.<sup>305</sup> By this, the juvenile court judge was an instrument of

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<sup>300</sup> Odongo, G.O., “The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context.” LL.D. Thesis, University of Western Cape, 2005. p. 20.

<sup>301</sup> Ibid, p. 21.

<sup>302</sup> Pitts, J., “Youth Justice in England and Wales”, op. cit, p. 77.

<sup>303</sup> Ibid.

<sup>304</sup> Odongo, op. cit.

<sup>305</sup> An English law doctrine symbolizing the role of the Monarchy in protecting vulnerable parties in courts of equity. The advent of welfarism saw the extension of this doctrine in English law to children’s issues, in which judges assumed wide discretionary powers to forcibly order the removal of children from destitute families. In the realm of juvenile justice, the philosophy of the doctrine meant securing the welfare of the child in the belief that the state must act as a child’s parents ‘securing needs rather than rights of the offender.’ See Schissel, B., *Social Dimensions of Canadian Youth Justice*. Toronto: Oxford University Press, 1993, p. vi. Elizabeth Scott explains that under this doctrine, interpreted as ‘parenthood of the State’, the State ‘has the responsibility to look out for the welfare of children and other helpless members of society. Thus, parental authority is subject to government supervision; if parents fail to provide adequate care, the State will intervene to protect children’s welfare.’ See Scott, E., “The Legal Construction of Childhood.” In Rosenheim, M.K., *et al* (eds.), *A Century of Juvenile Justice*. Chicago: University of Chicago Press, 2002, p. 116. In the early

the state for the application of intervention measures in situations that embodied prevailing social inadequacies.<sup>306</sup>

To achieve this role, the juvenile court was given powers to extend “protection” measures to minors in ‘irregular situations’ who included law violators, abandoned or neglected children, those in situations that put their well-being at risk and child orphans. In sum,

... the categories comprised both children in need of care and protection and delinquent children. For these children in ‘irregular situations’, their cases were to be attended to by an administrative judge who reached the verdict on the proper protection to be extended for the children’s welfare (or ‘best interests’). The verdict would usually entail probation or supervision, authorizing institutionalization in an orphanage or foster home, or sentencing the child to one of the penal institutions that existed then.<sup>307</sup> The ‘best interests’ of the child was thus viewed in light of the paternalistic role of the state in the choice of the best protection measure.<sup>308</sup>

In sum, the juvenile court, through the doctrine of *parens patriae*, ‘placed emphasis on treatment, supervision and control rather than on punishment and allowed the state to intervene affirmatively in the lives of more young offenders.’<sup>309</sup>

Through the 19<sup>th</sup> and 20<sup>th</sup> centuries, the doctrine of *parens patriae* and the welfare theories gained steady ground in the US, Canada and Western Europe. As Pitts notes, the welfare theory in juvenile justice in the UK was given greater impetus in the 1960s ‘by research that showed that the children who passed through the juvenile courts were overwhelmingly poor, badly educated and, in many cases, victims of

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<sup>306</sup> 20<sup>th</sup> century one consequence of this approach was that ‘children’s courts should not be an instrument to punish the child but one that protects and educates.’ See Bottoms, A. and J. Dignan, “Youth Justice in Great Britain.” In Tonry, M. and A.N. Doob, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives*. Vol. 31. Chicago/London: University of Chicago Press, 2004, p. 22.

<sup>307</sup> Odongo, op. cit.

<sup>308</sup> Clement, M., *The Juvenile Justice System: Law and Process*. London: Butterworth-Heinemann, 1997, p. 18.

<sup>309</sup> Odongo, op. cit, p. 22.

<sup>310</sup> Mack, J.W., “The Juvenile Court.” (1909) 23 *Harvard Law Review*. Vol. 23, 1909, pp. 104-122. p. 119 (Reprinted in Feld, B.C. (ed.), *Readings in Juvenile Justice Administration*. New York: Oxford University Press, 1999). See also Odongo, op. cit, p. 24.

violence or abuse.’<sup>310</sup> When the Labour government was elected in the UK in 1964, it became sympathetic to these children, which indicated that the “welfarist” argument would prevail. This sympathetic approach was exacerbated by the proposals made by the 1964 White Paper in the UK, entitled: *The Child, the Family and the Young Offender*. This White Paper, inter alia, ‘proposed the replacement of the juvenile court with a family council, composed of health and welfare professionals, which would address the social and psychological problems underlying youth crime.’<sup>311</sup> In fact, the White Paper originated from a report for the Fabian Society by the late Lord Longford in 1963, in which he observed that:

No understanding parent can contemplate without repugnance the branding of a child in early adolescence as a criminal, whatever offence he may have committed. If it is a trivial case, such a procedure is indefensible, if a more serious charge is involved this is, in itself, evidence of the child’s need for skilled help and guidance. The parent who can get such help for his child on his own initiative can most invariably keep the child from court. It is only the children of those not so fortunate who appear in the criminal statistics.<sup>312</sup>

Notably, the White Paper proposed a radical shift of power ‘from the police, magistrates, lawyers and judges to psychologists, psychiatrists and social workers.’<sup>313</sup> However, this proposal was vehemently and successfully opposed by the Conservative Opposition, leading to a significantly modified reform package that was presented to Parliament in the Children and Young Persons Act (1969). With this law, the juvenile court was retained with restricted powers of the magistrate to impose Borstal sentences. The law also passed responsibility for the supervision of young offenders in the community (from probation officers as was the case under the Probation of Offenders Act); and decisions about placements of young offenders in

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<sup>310</sup> Pitts, op. cit, p. 77.

<sup>311</sup> Ibid.

<sup>312</sup> Reproduced in Pitts, ibid, pp. 77-78.

<sup>313</sup> Ibid, p. 78.



Approved Schools, which were re-designated Community Homes with Education (CHEs) to local-authority social workers. The 1969 law also introduced a new measure: Intermediate Treatment (IT), ‘which could be utilised formally as a requirement in a Supervision Order, but which also permitted local authorities to establish community-based schemes to “prevent” youth crime among children and young people deemed to be “at risk” of offending.’<sup>314</sup> Upon proving its worth, the UK government envisaged, the IT would replace the Detention Centre and the Attendance Centre. In retrospect, ‘it is evident that the 1969 Act marked the highpoint of the 36-year struggle to construct a child-centred youth justice system, in which a concern for the “welfare” of the child, their needs rather than their deeds, was paramount.’<sup>315</sup>

### **3.3.3 The Need for Constitutional Oversight of the New Juvenile Court in the US**

Although the doctrines of *parens patriae* and welfarism were meant to treat the offending child basing on their needs, rather than their deeds – with a view to rehabilitating them – the administration of juvenile justice in the US in the early days was later to be seen as violative of certain children’s rights. Two problems emerged in this context: first, in the early juvenile justice system in the US, children ‘were not allowed the so called due process safeguards of the law.’<sup>316</sup> Indeed, this was in the absence of legal representation and other procedural safeguards like rules of

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<sup>314</sup> Ibid, p. 78.

<sup>315</sup> Ibid.

<sup>316</sup> Odongo, op. cit. p. 26.

evidence. Secondly, there was and ‘extensive reliance on the use of institutionalization, often, for indeterminate periods of time.’<sup>317</sup>

This was a result of the fact that in the US the juvenile court system ‘functioned for nearly 70 years with little constitutional oversight, and without the required presence of lawyers.’<sup>318</sup> Interestingly,

As the 1960s progressed, however, both the courts and society [in the US] had to deal with growing questions about the continued validity and vitality if the juvenile court’s informality and treatment focus in the absence of full regard for due process. On the one hand, critics from the right complained that the “kiddie court” was not fully capable of dealing with the “new” and “more dangerous” delinquent youths of that era, while their counterparts from the left urged with equal heat that the court was ignoring the juveniles’ rights.<sup>319</sup>

One of the overarching issues that critics from the left advanced was the lack of the right to counsel, which was dealt with for the first time in *Gideon v Wainwright*.<sup>320</sup> The issue of the right to counsel was further expounded in *Kent v United States*.<sup>321</sup> In this case, Morris Kent was denied his due process and statutory rights when the trial judge failed to hold a hearing prior to transferring the 16-year old to the adult court for trial and did not give Kent’s lawyer access to social information relied on by the court. Subsequently, the Court decided, among other things, that ‘there must be a meaningful right to representation by counsel in that the child’s attorney must be given access to the documents considered by the juvenile court in making its decision, and that the court must accompany its waiver order with a statement of the reasons for transfer.’<sup>322</sup>

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<sup>317</sup> Ibid, p. 26.

<sup>318</sup> Shepherd, Jr., op. cit.

<sup>319</sup> Ibid.

<sup>320</sup> 372 US 335 (1963).

<sup>321</sup> 383 US 541 (1966).

<sup>322</sup> Shepherd, Jr., op. cit.

Although in *Kent* the US Supreme Court was dealing with procedural irregularity in transfer proceedings, Justice Fortas, in reference to the importance of the right to counsel, observed succinctly that: ‘the right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice.’<sup>323</sup> One year after the decision in *Kent*, the President’s Commission on Law Enforcement and the Administration of Justice, appointed by President Lyndon Johnson, issued its report ‘that expressed, among other things, serious reservations about many of the fundamental premises of the [US] juvenile justice system, including its lack of procedural safeguards.’<sup>324</sup>

In principle, some of the issues identified above were addressed by the US Supreme Court in the landmark case of *In Re Gault*.<sup>325</sup> In fact, Gerald Francis Gault was a 15-year-old Arizona youth charged with making rude telephone call to a female neighbour. He was taken into custody without notice given to his parents, detained awaiting a hearing, convicted by a juvenile court in a rather summary hearing, and committed to a juvenile correctional facility for an indeterminate period not to extend his 21<sup>st</sup> birthday. Justice Fortas, once again, wrote the opinion for the US Supreme Court and ‘he initially ruled – for the first time, surprisingly – that juveniles are persons within the meaning of the Fourteenth Amendment and, thus, are protected by its Due Process Clause.’<sup>326</sup> According to Justice Fortas, Gault’s constitutional rights had been violated in several important respects – i.e. first, juveniles and their parents are entitled to constitutionally adequate notice of the precise nature of the charges

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<sup>323</sup> 383 US at 561.

<sup>324</sup> Shepherd, Jr., op. cit.

<sup>325</sup> 387 US 1 (1967).

<sup>326</sup> Shepherd, Jr., op. cit.

against the youth. Second, a youth charged with an act of delinquency must be advised of the right to the assistance of counsel and, if indigent, given the right to have counsel appointed. Third, the juvenile has the right to confront the witnesses against him or her in the hearing guilty or innocence and to cross-examine those witnesses. And, lastly, the privilege against self-incrimination applies to juvenile proceedings and the child must be informed of that right as well.

Reinforcing the central importance of the right to counsel developed in *Gideon* and reinforced in *Kent*, Justice Fortas was of the opinion that: ‘it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase “due process.” Under our Constitution, the condition of being a boy does not justify a kangaroo court.’<sup>327</sup> Most interesting on this issue was Gerald Gault’s observation made at an American Bar Association ceremony honouring Amelia Lewis with the Livingston Hall Award. Amelia was actually the lawyer who initiated Gault’s *habeas corpus* proceedings, challenging the Arizona practices. At this ceremony, Gault observed that, ‘without a lawyer, he had no idea what was happening to him in court until the judge said he was committed “until he was twenty-one” and he realised that was more years than he could count on the fingers of one hand.’<sup>328</sup> Remarkably, ‘*Gault* marked the constitutional domestication of the previously *parens patriae* juvenile court, and a new era dawned based on a process model contrasted with the historic informality of juvenile court proceedings.’<sup>329</sup>

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<sup>327</sup> *In re Gault*, op. cit, pp. 27-28.

<sup>328</sup> Shepherd, Jr., op. cit.

<sup>329</sup> Ibid.

Later on, the US courts went further requiring the juvenile to be proved guilty beyond reasonable doubt during the adjudicatory stage of delinquency cases.<sup>330</sup> At the same time, courts subsequently held that although the right to a jury was not required by the US Constitution in delinquency cases, a state could provide a jury if it so wished.<sup>331</sup> In addition, subsequent courts held that the Double Jeopardy Clause prevented a juvenile to court from transferring a juvenile the adult court after previously finding him or her delinquent.<sup>332</sup>

### **3.3.4 Criticisms against the Separate Juvenile Court in the US: Emergence of the Back to Justice Theory**

Despite the foregoing remarkable developments in the US juvenile justice system, there is now a blistering debate whereby some jurists in the US are pressing for radical reform of the juvenile justice, including re-incorporating juvenile court back onto the “ordinary” criminal courts. Some scholars<sup>333</sup> have referred to this movement as a “back to justice theory.”<sup>334</sup> One of the proponents of the abolition of a separate juvenile justice system in the US is Professor Barry Feld of the University of Minnesota. In his view and that of other abolitionists, the ‘court’s responsibility for young offenders should be ended.’<sup>335</sup> To him, the juvenile court ‘no longer lives up to its part of the initial bargain. Prosecutors in juvenile courts openly promote dispositions that amount to proportional retribution. Judicial decisions are based

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<sup>330</sup> *In re Winship*, 397 US 385 (1970).

<sup>331</sup> *McKeiver v Pennsylvania*, 403 US 532 (1971).

<sup>332</sup> See particularly *Breed v Jones*, 421 US 519 (1975); and *Swisher v Brady*, 438 US 204 (1978).

<sup>333</sup> See, for instance, Breen, C., *The Standard of the Best Interests of the Child*. The Hague: Martinus Nijhoff, 2002; Gale, F., et al (eds), *Juvenile Justice: Debating the Issues*. Australia: Allen and Unwin, 1993; Krisberg, B., *Juvenile Justice: Redeeming our Children*. London, Sage Publications, 2005; Pitts, J., “Youth Justice in England and Wales”, op. cit and Odongo, op. cit.

<sup>334</sup> Odongo, *ibid.* 29-34.

<sup>335</sup> Butts, J.A., “Can we do Without Juvenile Justice?”, op. cit.

explicitly on the severity of each juvenile's crime rather than the complexity of his or her problems.<sup>336</sup>

This assertion is actually a counter-attack against the dream of the early juvenile justice reformers, who a century ago, 'dreamed a dream that the juvenile system could reform delinquent children and transform society. And they worked devotedly to transform that dream into reality.'<sup>337</sup> This being the case, the contemporary movement aimed at abolishing the juvenile court in the US would make these reformers 'recoil in horror at the prospect of the increasing numbers of juveniles being tried and convicted in criminal courts and sentenced to serve long terms in adult prisons.'<sup>338</sup>

In contrast to the conformists of the US juvenile justice system, it is Professor Feld's view that the juvenile justice system has strayed too far from its original mission, which calls for policymakers to cancel it. According to him, today's juvenile court 'retains much of the terminology of juvenile law, but functions as a pseudocriminal court. Worse, it fails to provide complete due process protections for the accused youth. Juvenile courts are still not required to provide bail, jury trials, or the right to a speedy trial for youthful offenders.'<sup>339</sup>

Therefore, Professor Feld and other abolitionists recommend that all people violating the penal law, regardless of their age, should be dealt with in a criminal court.

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<sup>336</sup> Ibid.

<sup>337</sup> Shepherd, R.E., Jr., "The Juvenile Court Centennial Revisited – One State's Dreamers." Available at [www.abanet.org/crimjust/juvjus/14-2cjm.html](http://www.abanet.org/crimjust/juvjus/14-2cjm.html) (accessed 17 February 2012).

<sup>338</sup> Ibid.

<sup>339</sup> Butts, J.A., "Can we do Without Juvenile Justice?", *op. cit.*

Nonetheless, the criminal justice system should ‘continue to recognise the lessened culpability of the very young by imposing sentences with a “youth discount” – a 17-year-old defendant would get 75 percent of the sentence length due an 18-year-old, a 16-year-old would get 50 percent, etc.’<sup>340</sup> This proposition is actually very strong and policymakers in the US are finding it difficult to avoid. As Jeffrey Butts contends, it would be wrong ‘to assume that all critics of the juvenile justice court are heartless, law-and-order types who feel little compassion for the poor, disproportionately minority youth who comprise the bulk of the juvenile court’s clients.’<sup>341</sup> The critics most in favour of abolishing the juvenile justice system (Professor Feld, for example) ‘are often motivated by a concern for youth.’<sup>342</sup> In their learned view, ‘the juvenile court has never lived up to its rehabilitative promise and it never will.’<sup>343</sup> More importantly, they contend that ‘the juvenile court’s lower standards of due process are no longer tolerable given its modern emphasis on just deserts and retribution. Courts were meant to handle law violations, the abolitionists say, not social welfare problems.’<sup>344</sup>

At the same time, as Butts points out, it is wrong to describe all defenders of the juvenile court as “soft on crime” or unconcerned with victim’s rights. Accordingly, some of those who defend the juvenile justice system ‘do so because they believe [that] despite its flaws, the juvenile court offers a unique opportunity for broad, early

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<sup>340</sup> Ibid.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid.

intervention and effective crime prevention.’<sup>345</sup> In fact, the juvenile court was originally ‘conceived as an informal, quasi-civil court precisely in order to free it of the procedural complexities that prevent the criminal court from acting too aggressively. The juvenile court was deliberately designed to be flexible and quick to intervene.’<sup>346</sup>

Nonetheless, many states in the US have already started embarking on legislative reforms where the juvenile court has been engrained in the ordinary criminal justice system. As such, since the US Supreme Court’s decision in *Gault* in 1967, lawmakers across the US ‘have encouraged juvenile courts to embrace the goals and operational style of the criminal courts.’<sup>347</sup> In fact, juvenile courts today in the US ‘pursue many of the objectives once unique to criminal courts, including incapacitation and retribution. Both juvenile courts and criminal courts rely on plea bargaining for case outcomes.’<sup>348</sup> In fact, both are forced by growing caseloads ‘to adopt assembly-line tactics and they often have difficulty providing individualised dispositions. The day-to-day atmosphere in modern juvenile courts (especially in urban areas) is increasingly indistinguishable from that of criminal courts.’<sup>349</sup>

### **3.3.5 ‘Corporatism’ as the Third Model of Juvenile Justice**

Developments in, and criticisms against, the juvenile justice system necessitated the emergency of yet another important mode in the administration of juvenile justice in

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<sup>345</sup> Ibid.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

<sup>348</sup> Ibid.

<sup>349</sup> Ibid.



the 1980s. This period witnessed the growing number of countries around the world who saw the need to develop local multi-agency diversion panels to deal with offending children. The multi-agency panels were, in most cases, composed of representatives from the police, social services, education, the youth and the voluntary sector (such as NGOs or religious charities). In England and Wales, for instance,

Multi-agency diversion panels developed a range of educational, recreational and therapeutic ‘alternatives to prosecution,’ to which children and young people in trouble [with the law] could be diverted as a condition of their police caution. Many panels offered robust informal intervention in the spheres of education, family relationships, use of leisure, vocational training and drug abuse.<sup>350</sup>

This kind of approach to dealing with child offenders ushered in a new model of juvenile justice: “corporatism” that supplanted both the “welfare” and the “back to justice” models,<sup>351</sup> ‘and was triggered, initially, by a desire to manage young offenders more cost-efficiently.’<sup>352</sup> The panels diverted a volume of child and young offenders away from the criminal justice system, thus minimising the costs. Viewed in this context,

The emergence of corporatism did expose the simplistic nature of justice-welfare models while at the same time documenting the reality that juvenile justice practice had evolved beyond the core essentials of either justice or welfarism (for example in the primacy of diversion). This said, corporatism did not gain much significance as a theory *per se* but rather as a means of bringing to the fore the changes in practice, especially within the UK. In the debates on the philosophical frameworks for juvenile justice, it found little favour outside the UK and has largely been eclipsed even in recent texts there.<sup>353</sup>

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<sup>350</sup> Pitts, op. cit, p. 82. See also Sloth Nielsen, J., “The Role of International Law in the Development of South Africa’s Legislation on Juvenile Justice.” *Law, Democracy and Development*. Vol. 64, 2001.

<sup>351</sup> Pratt, J., “Corporatism: The Third Model of Juvenile Justice.” *British Journal of Criminology*. Vol. 29, 1989.

<sup>352</sup> Pitts, op. cit, pp. 82-83.

<sup>353</sup> Odongo, op. cit, p. 38.

However, the corporatism movement has received criticism particularly relating to the ever-present danger that its involvement of informal systems of justice ‘may make greater inroads into the lives and liberties of their subjects than would be the case in formal system it shadows.’<sup>354</sup> As Pitts observes, critics have argued that ‘because corporatism, through the medium of the “caution plus”, elaborates a “shadow tariff” alongside the formal tariff operating within the juvenile court, it effectively acts as “judge and jury” without regard to either the rules of evidence or due process of law.’<sup>355</sup>

However, as Pitts argues, there is little evidence that this has actually happened. Notably, the Conservative government in the UK – eager to build on the successes of the multi-agency diversion panel and alternatives to custody developed as part of the Intermediate Treatment Initiative – institutionalised many of the practices in the panels within the Criminal Justice Act (1991).<sup>356</sup> Nonetheless, through Corporatism, ‘the goal of securing welfarism, justice or rights for young people has become increasingly obscured.’<sup>357</sup>

### **3.4 The Spread of the Notion of Juvenile Justice Out of the US**

Although the notion of having a separate juvenile court is under constant criticism in the US, where it germinated, the concept is being engrained in many legal systems across the globe.<sup>358</sup> As Odongo contends, this trend ‘is reflected in countries over the

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<sup>354</sup> Pitts, op. cit, p. 83.

<sup>355</sup> Ibid.

<sup>356</sup> Ibid.

<sup>357</sup> Muncie, J., “Children’s Rights and Youth Justice.” In Franklin, B. (ed.), *The New Handbook of Children’s Rights - Comparative Policy and Practice*. London/New Yor:, Routledge, 2002, p. 91.

<sup>358</sup> See generally Walgrave, L and J. Mehlbye, “An Overview: Comparative Comments on Juvenile Offending and its Treatment in Europe.” In Mehlbye, J. and L. Walgrave (eds.), *Confronting Youth in*

world starting with Western European countries. In Africa, the phenomenon of juvenile courts was largely of colonial import and remains prevalent in a number of countries.<sup>359</sup> In this part, therefore, we trace this development in view of what took place since then up until to date.

### 3.4.1 The Spread and Development of the Juvenile System in the UK

Inspired by the US juvenile court, by 1910 ‘separate juvenile courts and a discrete institutional and administrative apparatus for dealing with young offenders had been established in most Western European countries.’<sup>360</sup> In effect, the advent of the juvenile court, ‘with its unique amalgam of science, law and administration, ushered into existence a wholly new kind of human being, the “juvenile delinquent”, the management of whom constituted its *raison d’etre*.’<sup>361</sup>

In England and Wales, for instance, three significant laws were enacted to give the juvenile court a legal force. These were the Children Act (1908) and the Prevention of Crime Act (1908), which established a national system of juvenile courts; and the Probation of Offenders Act (1907) that introduced community supervision as alternative to custody. As Pitts reflects: ‘By 1920, approximately 8,000 of the 10,000 people being supervised by probation officers were aged between 8 and 18 years.’<sup>362</sup>

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*Europe-Juvenile Crime and Juvenile Justice*. Copenhagen: AKF Forlaget, 1998, pp. 21-53; and Pitts, J., “Youth Justice in England and Wales”, op. cit, pp. 71-99.

<sup>359</sup> Odongo, op. cit, p. 18.

<sup>360</sup> Pitts, op. cit, p 73.

<sup>361</sup> Ibid. See also Platt, A., *The Childsavers*. Chicago: Chicago University Press, 1969.

<sup>362</sup> Ibid, p. 74.

Under the Prevention Crime Act in the UK, the Industrial Schools and reformatories were placed under the administrative control of the Home Office. The Act also Borstal institutions,<sup>363</sup> which ‘were penal institutions for inmates aged between 16 and 20 years, staffed by teachers as well as prison officers, and unlike adult prisons they provided educational and vocational programmes and military training.’<sup>364</sup>

As Crimmens and Pitts reminisce, one of the paradoxical ramifications of the introduction of these new institutions for child offenders brought about the 1907/8 law reform in laws relating to juvenile delinquents in the UK, was an unprecedented raise of the number of juvenile delinquents consigned to the reformatories and Borstals.<sup>365</sup> The reason for this increase was attributed to the new institutional approach of these institutions that focused on reforming juvenile delinquents as opposed to punishing them. The institutions were, thus, seen as beneficial to the consigned children as opposed to the ordinary prisons. However, the increase in the number of confined children in these institutions led to imposition ‘of greater custodian control on a larger number of less problematic subjects,’<sup>366</sup> than it was envisaged. Originally, the institutions were ‘established to create “alternative custody” and vouchsafe the humane treatment of those [children] consigned to custody.’<sup>367</sup>

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<sup>363</sup> Borstal is a name of a village in Kent where the first institution of this kind was established.

<sup>364</sup> Pitts, op. cit, p. 74.

<sup>365</sup> Crimmens, D. and J. Pitts, *Positive Residential Practice, Learning the Lessons of the 1990s*. Lyme Regis: Russell House Publishing, 2000.

<sup>366</sup> Pitts, op. cit.

<sup>367</sup> Ibid.

In effect, this “spreading of the net of control” was exacerbated by the issue of the probation order under the Probation of Offenders Act (1907). The order ‘placed young offenders under obligatory surveillance, with the ever-present danger of harsher penalties if they did not abide by the conditions of the probation order.’<sup>368</sup> In effect, these conditions required ‘not only that a young person desist from crime but that they also pursue an honest and industrious life, refrain from associating with other people involved in crime, and report to their probation officer when required to do so.’<sup>369</sup> This helped in scaling down crime rate of youth and child offending in England and Wales at the start of the twentieth century.<sup>370</sup>

### **3.4.2 The Spread and Development of Juvenile Justice into Africa**

The introduction of colonial rule in Africa in the 19<sup>th</sup> century went hand in hand with the imposition of legal systems, especially in the form of criminal justice, that were transplanted from the colonial powers – particularly, Great Britain and France. These powers had themselves ‘over a relatively long period, evolved advanced and complex criminal justice systems in an attempt to meet the increasing demands of their society.’<sup>371</sup> As we have seen in Chapter Two, the origins of criminal law in these countries were derived from Roman private law, ‘which is based on determining the level of culpability for crimes against person and property, including libellous comments, assault and injury, theft of property and financial dishonesty.’<sup>372</sup>

In the Roman private law, high level of discretion was retained by the administrators

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<sup>368</sup> Ibid, p. 75.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid.

<sup>371</sup> Bowd, R., “Status quo or Traditional Resurgence: What is Best for Africa’s Criminal Justice Systems?” In Chikwanha, A.B. (ed.), *The Theory and Practice of Criminal Justice in Africa*. Pretoria: Institute for Security Studies, 2009, pp. 35-55, p. 36.

<sup>372</sup> Ibid.

of the law and punishment was mainly based on reparations. With the collapse of the Roman Empire, this law lost its original form; but was developed into what is now practised in the Western world.<sup>373</sup> So, when the colonialists established their presence in Africa, they introduced criminal justice systems that were rooted in their homeland's legal systems. As a result, the majority of the legal systems existing today in Sub-Saharan Africa are certainly influenced by those in their former colonialists.

In order to establish and retain control of large populations in African colonies with relatively few administrators, the colonialists established a dual system of law, which imposed institutions akin to those in their home countries<sup>374</sup> at the same time retaining some of the well established indigenous African justice systems.<sup>375</sup> This is what has come to be known as dual legal system – or legal pluralism as best known in jurisprudential terms.<sup>376</sup> In this regard, the British colonial criminal justice was 'concerned particularly with the maintenance of law and order; sentencing was based on the principles of retribution and general deterrence and there was a marked

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<sup>373</sup> Ibid.

<sup>374</sup> Ibid, p. 39.

<sup>375</sup> Skelton, A., "Restorative Justice in Child Justice Systems in Africa." In Sloth-Nielsen, J. (ed.), *Children's Rights in Africa: A Legal Perspective*. Hampshire: Ashgate Publishing Limited, 2008, pp. 129-145, p. 130.

<sup>376</sup> A Comprehensive definition of legal pluralism is detailed in Magoke-Mhoja, M., *Child-Widows Silenced and Unheard: Human Rights Sufferers In Tanzania*. Dar es Salaam: Children's Dignity Forum, 2006, pp.14-22; and Odgaard, R., "The Struggle for Land Rights in The Context of Multiple Normative Orders in Tanzania." A paper available at [http://www.greenagrinet.dk/files/forslag\\_1083231778\\_rie.ordgaard.2004](http://www.greenagrinet.dk/files/forslag_1083231778_rie.ordgaard.2004) (accessed 8 January 2012). See also Woodman, G.R., "Progress Through Complexity: Options for the Subjects of Legal Pluralism." In Mehdi, E. and F. Shaheen (eds.), *Women's Law in Legal Education and Practice in Pakistan*. Copenhagen: New Social Science Monographs, 1997.

reluctance to take into account customary notions of compensation and restitution.<sup>377</sup>

So, juvenile justice being a sub-sector of the criminal justice system was born out of this colonial experiment. In many cases, juvenile justice laws in Africa formed part of colonially inherited laws ‘with the resultant effect that the philosophy of how to manage child offenders reflected the social construction of childhood as conceptualized by the colonizing countries.’<sup>378</sup> Mirrored through this reality, Odongo proposes two questions that arise from this historical reality: first, whether or not the juvenile justice laws in Africa could mirror the welfarism and justice models then prevalent in Western Europe; given the fact that colonialism was introduced not for the betterment of Africa’s welfare, but for colonial and capitalist interests. Second, ‘whether more recent developments in western countries have found their way into African juvenile justice systems.’<sup>379</sup>

According to Odongo, in recent times, Africa has witnessed ‘socio-economic transformations similar to those which shaped the social construction of childhood and by extension the subject of juvenile justice in terms of welfare or justice models in North America and Western Europe in the early 20<sup>th</sup> century.’<sup>380</sup> These socio-economic conditions are seen in the relationship between youth crime and

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<sup>377</sup> Coldham, S., “Criminal Justice Policies in Commonwealth Africa: Trends and Prospects.” *Journal of African Law*. Vol. 44, 2000, pp. 218-238, p. 220.

<sup>378</sup> Odongo, op. cit, p. 40. See also Alemika, E.O. and I.C. Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice*. Lagos: Centre for Law Enforcement Education, 2001, p. 10.

<sup>379</sup> Odongo, *ibid*.

<sup>380</sup> *Ibid*, pp. 39-40.

urbanisation in the African context in amplification of the general link between urbanisation and increase in crime rate.<sup>381</sup> As observed in section 4.2.1 above, part of the efforts of “the progressives” or “child savers” in fashioning ways of dealing with child deviance ‘arose as a result of increased industrialization and consequent urbanization from which they feared there would result social disruption, including the problem of deviancy.’<sup>382</sup> In fact,

This is mostly manifest in very fast rates of urbanization reaching an average rate of 5 per cent per annum in the sixteen years between 1980 and 1996.<sup>383</sup> With urbanization comes the strain on basic services and, together with a host of factors such as the whittling down of the traditional family structure and the high prevalence of the HIV/AIDS pandemic, increasing crime rates including youth offending are inevitable.<sup>384</sup>

Indeed, the consequences of economic restructuring programmes, the impact of debt crisis on social policies and community life ‘are all relevant factors to the general issue of crime in Africa and child offending in particular.’<sup>385</sup> As the United Nations notes, ‘in Africa as [with the Asian and the Pacific regions], child crime and delinquency are primarily urban phenomena and specifically attributable to hunger, poverty, malnutrition and unemployment which are linked to the marginalization of children in already severely disadvantaged segments of society.’<sup>386</sup>

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<sup>381</sup> Petty, C. and M. Brown, “Urbanisation and Issues of Justice.” In Petty, C. and M. Brown (eds.), *Justice for Children: Challenges for Policy and Practice in sub-Saharan Africa*. London: Save the Children, 1988, p. 63.

<sup>382</sup> Odongo, op. cit, p. 40 (note 77).

<sup>383</sup> UNICEF, *State of the World's Children*. Oxford/New York: Oxford University Press, 1998. (Comparing this with a growth rate of 0.8 per cent over the same period in industrialized countries where the bulk of the population (up to 75%) was already living in urban areas by then).

<sup>384</sup> Odongo, op. cit, p. 41.

<sup>385</sup> Ibid.

<sup>386</sup> United Nations, *International Review of Criminal Policy Nos. 48 & 49 (1998-1999)*. New York, United Nations, 1999, p. 7.



So, these factors have just helped to reshape the African juvenile justice systems in the 1990s and 2000s, which witnessed immense juvenile justice law reform initiatives in the context of the CRC and ACRWC. These reforms, by implications, have helped to do away with the colonially inherited juvenile justice laws in many Sub-Saharan countries.<sup>387</sup> However, before this period, most of African juvenile justice systems were founded on colonially inherited laws, which were marked by the dominance of welfarism. For instance, most of British colonies – e.g. Kenya, Nigeria, Uganda, Tanzania, and Zimbabwe – have a semblance of juvenile justice laws akin to the repealed 1933 British Children and Young Persons Act. In these countries, the juvenile laws – mostly bearing the same name as the British juvenile justice law – provided for the welfare of young offenders and the establishment of juvenile courts. They covered both children in need of care<sup>388</sup> and protection and children in conflict with the law and made no distinct provisions for the separate treatment in the application of the law for these two groups of children.<sup>389</sup>

Although the former colonies continued to apply the colonially inherited juvenile justice laws based on welfarism, their former colonial powers had experienced radical transformation of the laws from welfarism to justice model and eventually, some elements of a crime control philosophy in the new western juvenile justice

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<sup>387</sup> See, for instance, Ghana, Kenya, Namibia, South Africa, Tanzania and Uganda.

<sup>388</sup> Under the repealed Tanzanian Children and Young Persons Act, Cap. 13 R.E. 2002, this was provided for in Section 25.

<sup>389</sup> Odongo, op. cit. See also South Consulting, “Juvenile Justice in Kenya: Project Identification Mission.” An Unpublished Report Commissioned by the Royal Netherlands Embassy, 1999; Owasanoye, B. and M. Wernham (eds.), *Street Children and the Juvenile Justice System in Lagos State*. London: Consortium for Street Children, 2004, p. 27; and Kaseke, E., “Juvenile Justice in Zimbabwe: The Need for Reform.” *Journal of Social Development in Africa*. Vol. 8 No. 1, 1998, pp. 11-17.

systems.<sup>390</sup> It was only in the 1990s and 2000s when Sub-Saharan countries began to reform their colonially inherited laws partly due to their ratification and implementation of the CRC and ACRWC. This steady widespread of the juvenile justice system has been intensified by the promulgation of the CRC in 1989 and the ACRWC in 1990.<sup>391</sup> Both the ACRWC and the CRC – supplemented by the trio non-binding international juvenile justice instruments<sup>392</sup> – ‘represent a blend of both justice and welfare theories.’<sup>393</sup> In addition, the CRC ‘and other instruments offer a new model for considering juvenile justice in light of the overall vision of child autonomy and respect for the child’s rights.’<sup>394</sup> According to Doek, child autonomy is very important in exploring whether children’s rights have had an impact on juvenile justice in the domestic legal systems.<sup>395</sup> In addition, Odongo argues that ‘the CRC reveals an attempt to move away from paternalistic views of juvenile justice by the emphasis it places on *reintegration* as the primary objective of the juvenile justice system rather than *rehabilitation*.’<sup>396</sup>

In Africa, for instance, since the turn of the past millennium many countries have been busy overhauling their inherited colonial laws and replacing them with modern, more accessible and often more comprehensive children’s statutes that, *inter alia*,

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<sup>390</sup> Odongo, op. cit.

<sup>391</sup> See particularly Rios-Kohn, op. cit; and Sloth-Nielsen and Mezmur, op. cit.

<sup>392</sup> Beijing Rules, Riyadh Guidelines and the UN Rules for the Protection Juveniles Deprived of their Liberty.

<sup>393</sup> Odongo, G.O., “The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context.” In Sloth-Nielsen, J. (ed.), *Children’s Rights in Africa: A Legal Perspective*. Hampshire: Ashgate Publishing Limited, 2008, pp. 147-163, p. 148.

<sup>394</sup> Ibid.

<sup>395</sup> Doek, J., “Modern Juvenile Justice in Europe.” In Rosenheim, M.K. et al (eds.), *A Century of Juvenile Justice*. Chicago/London: University of Chicago Press, 2002, p. 524.

<sup>396</sup> Odongo, G.O., “The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context”, op. cit, p. 148. See also Van Bueren, G., *The International Law on the Rights of the Child*. The Hague: Martinus Nijhoff, 1995.

promote and protect the rights of juveniles in conflict with the law.<sup>397</sup> Indeed, while some of these law reform processes ‘are complete and the final statutes passed by parliament, others are not yet at that stage and are either under development or in parliamentary processes.’<sup>398</sup> In the former examples are Ghana, Kenya, Madagascar, Nigeria and Uganda; whereas examples of the latter are Botswana, Lesotho, Mozambique, Namibia, South Africa, South Sudan and Swaziland where the review and redrafting processes are just commencing.<sup>399</sup>

In fact, all these law reform processes are inspired by the CRC and the ACRWC; that is, they are ‘premised on the rights of the child rather than the powers of the parents.’<sup>400</sup> Interestingly,

[In Africa today] there is an ongoing debate about the inclusion of juvenile justice legislation in comprehensive child law enactments, a debate which has not been resolved. Kenya, Nigeria and Uganda provide examples of composite approaches to the issue, with child justice being included in the overall Children’s Act. Lesotho, too, has adopted the strategy of linking child justice to child protection and welfare generally; possibly arising from the strategic concern, linked to harsh public and political perceptions about crime in Southern Africa, that separation of child offenders legislatively-speaking might eventually result in a punitive criminal justice response to children in conflict with the law.<sup>401</sup>

Therefore, there is a considerable legislative action aimed at promoting and protecting juvenile justice in Africa to date.<sup>402</sup> Tanzania, just coming late in the

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<sup>397</sup> Sloth-Nielsen and Mezmur, op. Cit, pp. 332-333.

<sup>398</sup> Ibid, p. 333.

<sup>399</sup> Ibid.

<sup>400</sup> Ibid.

<sup>401</sup> Ibid, pp. 333-334. This public and political perception on crime in Africa resulted in the splitting of the child justice bills from the comprehensive laws in Ghana, Mozambique, South Africa and The Gambia.

<sup>402</sup> Ibid, pp 332-335. For a comprehensive comparison of legislative action in certain African countries, *see* particularly Odongo, G., “The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context.” Op. cit.

picture,<sup>403</sup> has adopted a composite approach to legislating on juvenile justice. Unlike South Africa that has separated the juvenile justice legislation<sup>404</sup> from the mainstream child rights law,<sup>405</sup> Tanzania has included provisions relating to juvenile justice in a comprehensive Law of the Child Act (2009)<sup>406</sup>, which comprises all children's rights except those which have to do with inheritance<sup>407</sup> and early marriages.<sup>408</sup>

### 3.5 Contemporary Administration of the Juvenile Justice System

As indicated in the previous section, juvenile justice now occupies a central role in the administration of criminal justice the world over. With the increasing inevitability to have child-specific laws in many legal systems around the world, a need to have a separate juvenile justice system becomes of paramount significance. In this section, therefore, we shed a light on the contemporary principles of administration of juvenile justice.

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<sup>403</sup> See Mashamba, C.J., "Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania." In Sorensen, J.J. and I. Jepsen (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of Child to Work in Africa and Nepal*. Copenhagen: Danish Institute for Human Rights, 2005. See also Mashamba, C.J., "Accepting the Necessary Evil: The Need for a new Statute Promoting and Protecting Children's Rights in Tanzania." *The Justice Review*. Vol. 5 No. 5, 2007, pp. 11-15.

<sup>404</sup> See the Child Justice Act.

<sup>405</sup> See the Children's Act.

<sup>406</sup> Provisions relating to children in conflict with the law are examined at length in Chapter Seven of this Thesis.

<sup>407</sup> However, Section 10 of the Law of the Child Act has a semblance of the child's right to parental property in the following regards: 'A person shall not deprive a child of reasonable enjoyment out of the estate of a parent.'

<sup>408</sup> Although stakeholders, particularly members of the CSO lobby groups, pressed for the inclusion of issues relating to inheritance rights and early child marriages in the Law of the Child Act (2009), the Government opted for the exclusion of provisions touching on these matters, arguing that it needed ample time for further and wider consultations with stakeholders in these matters. Nonetheless, the drafters of the Law of the Child Act (2009) were clever enough to include a more technical provision protecting children in inheriting from their deceased parents. According to section 10 of the Act, 'A person shall not deprive a child of reasonable enjoyment out of the estate of a parent.' For a comprehensive account of Tanzania's legislative efforts on this law, see particularly Mashamba, C.J. and K.L. Gamaya, "The Enactment of the Tanzanian Law of the Child Act (2009): Some Lessons Learnt from CSOs' Participation in the Lawmaking Process." *The Justice Review*. Vol. 8 No. 2, 2009.

### 3.5.1 The Rationale for a Separate Criminal Justice System for Offending Children in Modern Times

The aforementioned trends in dealing with offending children at the international as well as local arenas reflect the results of the global experience and reflection over several decades on the best ways to protect the rights of the child, particularly the one in conflict with the law.<sup>409</sup> The imperatives of having special rules and principles that protect the welfare of young offenders, separate from adult offenders, are best opined by C. de Rover in the following regards,

Because of their age, *juveniles are vulnerable to abuse, neglect and exploitation* and need to be protected against such threats. In keeping with the objective of *diverting juveniles away from the criminal justice system* and directing them towards the community, special measures for the prevention of juvenile delinquency must be developed.<sup>410</sup> [Emphasis supplied.]

Viewed in the foregoing context, the contemporary criminal justice system should be ‘concerned with the balancing of competing interests, those of the victim and of society.’<sup>411</sup> In this regard,

Society cannot let misdeeds go unnoticed, while the child offender requires the development and application of responsive and useful measures aimed at ensuring future maturation into law abiding adulthood. It goes without saying that child offenders are frequently drawn from the most vulnerable and marginalised groups. They are the children of broken families, they live in gang-infested neighbourhoods, they are without satisfactory adult role models, they themselves have been victimised from early in life, they often have proven psychological and psychiatric deficits, low achievement rates at school and so forth.

Therefore, criminal law and the criminal justice system should ensure that such children are treated in such a manner that would not further victimise them; rather,

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<sup>409</sup> See Mashamba, C.J., “Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economic and Politics of Administration of Juvenile Justice in Tanzania”, op. cit.

<sup>410</sup> De Rover, op. cit, p. 315.

<sup>411</sup> Sloth-Nielsen and J. Gallinetti, “‘Just Say Sorry?’ *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008.” *P.E.R.*, Vol. 14 No. 4, 2011, pp. 63-90, p. 83. See also Muntingh, L., *A Societal Responsibility: The Role of Civil Society Organisations in Prisoner Support, Rehabilitation and Reintegration*. Pretoria: Civil Society Prison Reform Initiative and Institute for Security Studies, 2009; and Muntingh, L., *Exprisoners’ Views in Imprisonment and Re-Entry*. Cape Town: Civil Society Prison Reform Initiative and Community Law Centre, 2010.

alternative measures should be embedded in the criminal justice system that ensure that those children in conflict with the law grow and develop into responsible and productive adults. Recently, the need to deal with children in conflict with the law in a more compassionate manner and positive manner has been expressed judiciously in *Centre for Child Law v Minister of Justice and Constitutional Development and Others*<sup>412</sup>, where the South African Constitutional Court held that:

The Constitution draws this sharp distinction between children and adults not out of sentimental considerations but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer and their ability to make choices generally more constricted than those of adults. They are less able to protect themselves, more needful of protection and less resourceful in self-maintenance than adults. These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders.<sup>413</sup>

In practice, there has been in existence a semantically misunderstanding when a state is urged to set up a juvenile justice system or to undertake comprehensive reform of the existing system.<sup>414</sup> However, according to children's rights activists,<sup>415</sup> juvenile justice is not a system but an overlapping of systems.<sup>416</sup> In that regard, therefore, 'the administration of juvenile justice is not so much a *different* set of rights to which juveniles are entitled, as a set of provisions that aim to offer protection in addition to the rights of adult persons - which of course apply equally to juveniles.'<sup>417</sup> Rather, the juvenile justice system is a necessary, parallel establishment to the effective functioning of any criminal justice system in any jurisdiction to date.

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<sup>412</sup> 2009 ZACC 18.

<sup>413</sup> Ibid, paras 26-7.

<sup>414</sup> Mashamba, op. cit.

<sup>415</sup> See, for instance, Abramson, B., "Juvenile Justice: The 'Unwanted Child' of State Responsibilities – An Analysis of the Concluding Observations of the Committee on the Rights of the Child in Regard to Juvenile Justice from 1993 to 2000." Defence for Children International. Available at [www.dci-au.org/html/unwanted.html](http://www.dci-au.org/html/unwanted.html) (accessed 23 February 2012).

<sup>416</sup> According to Abramson, 'there is no single system but rather an overlapping of several independent

systems, such as the police, judiciary and prisons'.

<sup>417</sup> De Rover, op. cit.

### 3.5.2 Juvenile Justice as an Integral Part of Human Rights

Today, it has been well settled that it is of paramount significance to accord children and adolescents special care and assistance; thus, the need for ‘a separate body of human rights treaties for young people of the apparent age below 18 years.’<sup>418</sup> This is so principally because, ‘children and adolescents are in a period of development. What happens to them or fails to happen at each step of the way in the law enforcement process not only affects them in the here-and-now but will also shape their future development for good or for ill.’ Therefore, states ‘must respond to the criminal activity of minors, certainly for the sake of society and for the sake of the offenders.’<sup>419</sup>

Therefore, the administration of juvenile justice aims at enhancing the ‘well-being of the juvenile and to ensure that any reaction to juvenile offenders is proportionate to the circumstances of the juvenile and the offence. Juvenile offenders should be diverted from criminal justice system and redirected to community support services wherever possible.’<sup>420</sup> As such, the abovementioned international instruments are designed specifically, first, to protect the human rights of juveniles; second, to protect the well-being of juveniles who come into contact with the law; third, to protect juveniles against abuse, neglect and exploitation; and, lastly, to introduce special measures to prevent juvenile delinquency.<sup>421</sup> These international instruments contain, *inter alia*, the principles outlined below.

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<sup>418</sup> Mashamba, op. cit.

<sup>419</sup> Abramson, op. cit.

<sup>420</sup> De Rover, op. cit.

<sup>421</sup> Ibid.

### 3.5.3 Basic Principles of Administration of Juvenile Justice

The general principles of administration of juvenile justice are contained in the CRC,<sup>422</sup> which requires states parties to take measures that combat abuse, neglect and exploitation of children through its “4 Ps” principles.<sup>423</sup> The CRC contains, in the main, measures that aim at protecting juveniles in conflict with the law. Article 40 is relevant to this point. It provides for the right of children alleged or recognized as having committed an offence to respect for their human rights; and, in particular, to benefit from all aspects of the due process of law, which include, but not limited only to, legal or other related assistance, in preparing and presenting their defence. The article also requires that ‘recourse to judicial proceedings and institutional placements (of juvenile offenders) should be avoided wherever possible’.<sup>424</sup> Thus, the article emphasizes *resort to diversion system*<sup>425</sup> of the administration of juvenile justice.

In terms of the provisions of Article 37 of the CRC, deprivation of liberty for children can only be used *as a measure of last resort and for the shortest appropriate time*. Parallel to these provisions are the provisions of Article 39 of the CRC, which provide for rights of children as victims of crime. The article requires states parties thereto to take appropriate measures to promote physical and psychological recovery

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<sup>422</sup> It entered into force on 2<sup>nd</sup> September 1990.

<sup>423</sup> The “Ps” stand for: the *participation* of children in decisions affecting their own destiny, the *protection* of children against discrimination and all forms of neglect and exploitation, the *prevention* of harm to children, and the *provision* of assistance for their basic needs.

<sup>424</sup> Defence for Children International, *International Standards Concerning the Rights of the Child – United Nations Convention on the Rights of the Child*. Vol. 1, Geneva: Defence for Children International, 1995, p. 9.

<sup>425</sup> Diversion in this context means putting in place different machinery and alternative programmes for dealing with juvenile offenders thus diverting them from the criminal justice system and the normally known custodial placements for convicted offenders, such as jail and prisons.



and social reintegration for children victims of abuse, neglect, torture or any other forms of cruel, inhuman or degrading treatment or punishment. Such recovery and reintegration ought to occur in an environment that fosters the health, self-respect and dignity of the child.<sup>426</sup>

It is axiomatic that Africa is the only continent on the earth that has got a specific child rights instrument, i.e., the ACRWC. Detailed provisions about juvenile justice are contained in Article 17 of the ACRWC. The Article, more or less, contains similar provisions as those provided for in Articles 37, 39 and 40 of the CRC. Nonetheless, Article 17 of the ACRWC includes further aspects of placing the child at the centre of family and community. In particular, the ACRWC provides, under Article 17(3), that: ‘The essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be his or her reformation, reintegration into his or her family and social rehabilitation.’

It also does not contain any express provision on diversion in contrast to Article 40(4) of the CRC. Unlike the CRC, the ACRWC leaves a room for States Parties thereto to set their own minimum age of criminal responsibility. This room, which is amenable to abuse by certain notorious states which have already set the age of criminal responsibility as lower as 7 years, is couched in the following wording: ‘There shall be a minimum age below which children shall be presumed not to have

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<sup>426</sup> Mashamba, op. cit.

the capacity to infringe the penal law.’<sup>427</sup> Nonetheless, the ACRWC ‘is an instrument that seeks to “Africanize” the administration of juvenile justice.’<sup>428</sup>

### 3.5.4 Prevention of Juvenile Delinquency under International Human Rights

#### Law

The principles of prevention of juvenile delinquency are provided for in the UN Guidelines for the Prevention of Juvenile Delinquency (also popularly known as the *Riyadh Guidelines*).<sup>429</sup> The *Riyadh Guidelines*<sup>430</sup> were promulgated to form a positive, pro-active, and comprehensive approach to the prevention of juvenile delinquency.<sup>431</sup> The Guidelines, for many reasons, ‘express a growing awareness that children are full-fledged human beings.’<sup>432</sup> They are concerned primarily with the prevention of juvenile delinquency. Indeed,

They focus, particularly, on early protection and preventive intention paying particular attention to children in situations of *social risk*. *Social risk* here implies children who are demonstrably endangered and in need of non-punitive measures because of the effects of their circumstances and situation on health, safety, education...as determined by a competent authority.<sup>433</sup>

This concept buttresses the *Riyadh Guidelines*, paying particular attention on factors that underlie social risk, including possible inherent behaviours of a particular child or group of children, inherent characteristics like disability, relationship between the child and the family, and socio-economic circumstances in which the child lives, such as poverty. It can be summed up, in effect, that in most ‘cases children at social

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<sup>427</sup> Article 17(4) of the ACRWC.

<sup>428</sup> Mashamba, op. cit.

<sup>429</sup> The Guidelines were passed at the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders held in Havana Cuba in 1990, by resolution 45/112.

<sup>430</sup> So named referring to an important international experts’ consultative meeting on the draft text held in Riyadh, Saudi Arabia, in 1988.

<sup>431</sup> Mashamba, op. cit.

<sup>432</sup> Cappelaere, G., *International Standards Concerning the Rights of the Child – United Nations Guidelines for the Prevention of Juvenile Delinquency*. Geneva: Defence for Children International, 1995, p. 1.

<sup>433</sup> Mashamba, op. cit.

risk are affected by the interplay of all those factors, the more adverse the factors, the greater the chance that the child will drift towards delinquent activities.’<sup>434</sup>

The *Riyadh Guidelines* are said to be comprehensive in that they deal with almost every social area; the three main environments in the socialization process (family, school and community), the mass media, social policy, legislation and juvenile justice administration.<sup>435</sup> They emphasize for ‘comprehensive prevention plans at every government level,’ including coordination of efforts between governmental and non- governmental agencies.<sup>436</sup> They highlight, further, a need to have systematic and continuous monitoring and evaluation, as well as community involvement ‘through a wide range of service and programmes; interdisciplinary cooperation; youth participation in prevention policies and processes.’<sup>437</sup> The Guidelines, moreover, introduce socialization process by which emphasis should be placed ‘on preventive policies facilitating the successful socialization and integrating of all children and young persons, in particular through the family, the community, peer groups, schools, vocational training and the world of work, as well as through voluntary organizations.’<sup>438</sup>

The Guidelines also comprise of some elements calling for proactive approach such as the focus on upgrading the quality of life, the overall well being of children as potential members of the society. Under Guideline 6, for example, the Guidelines

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<sup>434</sup> Ibid.

<sup>435</sup> Cappelare, op. cit, p. 2.

<sup>436</sup> See particularly Guideline 9 of the *Riyadh Guidelines*.

<sup>437</sup> Ibid.

<sup>438</sup> Ibid. Guideline 10.

punctuate that: ‘Community-based services should be developed (with) [F]ormal agencies of social control (being) utilized only as a last resort.’ By virtue of Guideline 2, prevention of juvenile delinquency requires efforts by the entire society to ensure harmonious development of adolescents, with respect for the promotion of their personality from early childhood.’ In relation to the mass media, the *Riyadh Guidelines* categorically enumerate that mass media ‘should portray the positive contribution of young people to the society (so as to enable them feel that their respective contribution [is] valuable to the society).’<sup>439</sup>

Pursuant to the provisions of Guideline 5 (f), the Guidelines demand that if a state labels a child as a delinquent or deviant, ‘the labelling can unwittingly contribute to a child’s anti-social behaviour.’<sup>440</sup>

### **3.5.5 Safeguarding the *Best Interest of the Child* in the Administration of Juvenile Justice**

The United Nation Standard Minimum Rules for the Administration of Juvenile Justice (the *Beijing Rules*) do provide explicitly for safeguarding the best interest of the child in the course of administration of juvenile justice.<sup>441</sup> The Rules operate within the framework of two other sets of rules governing juvenile justice, both adopted in 1990: The United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) and the United Nations for the Protection of Juveniles Deprived of their liberty (the JDL Rules). In principle,

These three sets of rules can be seen as guidance for a three stage process; firstly, social policies to be applied to prevent and protect young people from offending

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<sup>439</sup> Mashamba, op. cit.

<sup>440</sup> Ibid.

<sup>441</sup> Ibid.

[the *Riyadh Guidelines*]; secondly, establishing a progressive justice system for young persons in conflict with the law [the *Beijing Rules*]; and finally, safeguarding fundamental rights and establishing measures for social re-integration of young people deprived of their liberty, whether in prison or other institutions (the JDL Rules).<sup>442</sup>

These Rules develop and extend those articles of the CRC that cover issues such as arrest, detention, investigation and prosecution, adjudication and disposition and the institutional and non-institutional treatment of juvenile offenders.<sup>443</sup> They, in the main, provide a framework within which a national juvenile justice system should operate and a model for state of affair and humane response to children who may find themselves in conflict with the law.<sup>444</sup> In sum, the Beijing Rules cover the whole range of administration of juvenile justice processes, which include investigation and prosecution, adjudication and disposition, and non-institutional treatment and institutional treatment of juvenile offenders.

Nonetheless, it is important to note that the *Beijing Rules* are not a binding treaty; although some of them have become binding on states parties by being incorporated into the CRC<sup>445</sup> and the ACRWC,<sup>446</sup> others can be treated not as establishing new rights but as providing more detail on the contents of existing rights.<sup>447</sup> However, the UN General Assembly has created some sort of enforceability by requiring states parties to inform the Secretary General every five years on the application of the

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<sup>442</sup> van Bueren, G. and A. Tootell, *Introduction to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice*. Geneva: Defence for Children International, 1995, p.1.

<sup>443</sup> De Rover, op. cit, p. 318.

<sup>444</sup> Mashamba, op. cit.

<sup>445</sup> See particularly Article 40 of the CRC.

<sup>446</sup> See particularly Article 17 of the ACRWC.

<sup>447</sup> Mashamba, op. cit.

Rules. Non-Governmental Organizations (NGOs) are also urged to collaborate with governmental institutions in implementing these principles.<sup>448</sup>

### **3.5.6 Protecting the Rights of Juveniles Deprived of their Liberty**

The UN Rules for the Protection of Juveniles Deprived of their Liberty (the JDL Rules) ensure that juveniles are “compelled” to be deprived of their liberty ‘only when there is an absolute necessity to do so.’<sup>449</sup> The Rules emphasise that juveniles under detention should be treated humanely, with due regard for their status and with full respect for their human rights.<sup>450</sup> Under the JDL Rules, the expression of “children deprived of their liberty” applies to include deprivation of children’s liberty in all situations, including children in welfare institutions.<sup>451</sup> Accordingly, deprivation of liberty in this regard includes, ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting from which a person under the age of 18 is not permitted to leave at will, by order of any judicial, administrative or other public authority.’<sup>452</sup>

In that respect, the Rules apply to juveniles deprived of their liberty by operation of penal law on those under 18 years of age deprived of their liberty in health and welfare placements.<sup>453</sup> It is interesting to note that these Rules have the advantage of applying to all those children under 18 deprived of their liberty without any reference

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<sup>448</sup> Ibid.

<sup>449</sup> De Rover, op. cit, p. 318

<sup>450</sup> Ibid.

<sup>451</sup> In Tanzania, these institutions may include Children’s Homes, Remand Homes, Orphanages, etc.

<sup>452</sup> van Bueren, G., *Standards Concerning the Rights of the Child: United Nations Rules for the Protection of Juveniles Deprived of their Liberty*. Geneva: Defence for Children International, 1995, p. 1.

<sup>453</sup> Ibid.

to national definitions of childhood, and without being dependent upon the jurisdiction of special proceedings.

Forming the crux of a body of rules meant to provide elaborations of the basic principles of the CRC, these Rules comprise of such fundamental principles, *inter alia*, as, first, children should be deprived of their liberty only as a last resort and for the minimum period; and this should be limited only to practically exceptional cases. Second, juveniles should only be deprived of their liberty in accordance with the principles and procedures of international law. Third, there is a need to have established small open facilities to enable individualized treatment and to avoid the additional negative effects of deprivation of liberty.<sup>454</sup>

Fourth, deprivation of liberty should only be in facilities which guarantee meaningful activities and programmes promoting the health, self respect and sense of responsibility of juveniles, so as to foster their skills to assist them in developing their potential as members of society.<sup>455</sup> Fifth, there should be decentralization of detention facilities so as to enable access and contact of juveniles with family members hence reintegration into the community. Sixth, all juveniles deprived of their liberty should be helped to understand their rights and obligations during detention and be informed of the goals of the care provided.<sup>456</sup> And, lastly, juvenile justice personnel should receive appropriate training including basic principles of

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<sup>454</sup> Van Bueren, op. cit.

<sup>455</sup> Ibid.

<sup>456</sup> Ibid.

welfare and human rights.<sup>457</sup> Domestic Implementation of the Provisions of the International Standards of Children's Rights in the Juvenile Justice

### **3.5.7 Domestic Implementation of the Provisions of the International Standards of Children's Rights in the Juvenile Justice**

The UN Guidelines for Action on Children in the Criminal Justice System<sup>458</sup> aim at assisting states in the domestic implementation of the provisions of the CRC (and the ACRWC) together with those of the above stated rules and guidelines. The Guidelines for Action provide, *inter alia*, for measures to be taken at the international level in implementing the provisions of the aforesaid instruments, the importance of a rights-based approach in juvenile administration and pro-active responses based on effective preventive and re-integrative measures. They further accentuate the essence of the principle of non-discrimination including gender sensitivity in the administration of juvenile justice, upholding of the best interest of the child, the right to life, survival and development and the duty of states to respect the view of the child.<sup>459</sup>

In the final analysis, it can be noted that all these international instruments apply in dependent of each other. As such, in broad practical terms, criminal justice personnel 'should look: first, to the Convention on the Rights of the Child and then to the Riyadh Guidelines in seeking to prevent children from coming into conflict with the law; secondly, to the Convention and the Beijing Rules when dealing with children alleged as or accused of having come into conflict with he law; thirdly, to the

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<sup>457</sup> Ibid.

<sup>458</sup> These Guidelines were drafted by a group of experts meeting held in Vienna in 1997.

<sup>459</sup> Mashamba, op. cit.



Convention and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty for dealing with children found to be in breach of the criminal law.’<sup>460</sup>

### 3.5.8 The *International Umbrella Principles* in Administration of Juvenile

#### Justice

The *International Umbrella Principles* are a number of fundamental principles that apply to each and every stage of the administration of juvenile justice.<sup>461</sup> They are essentially subsumed from the relevant international instruments, as discussed above, to provide basic common standards in the administration of juvenile justice the world over. For the purposes of this study, therefore, some fifteen *International Umbrella Principles* are herein below reproduced:

- (i) Juvenile justice legislation should apply to all those under the age of 18 as the age of childhood;<sup>462</sup>
- (ii) Juvenile justice is an integral part of national development process of the state and as such should receive sufficient resources to enable the juvenile justice system to be organized in accordance with international principles;<sup>463</sup>

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<sup>460</sup> Ibid.

<sup>461</sup> Ibid.

<sup>462</sup> Rule 11 (a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty; Article 6 para 5 of the ICCPR; and article 37 (a) of the CRC prohibiting the death penalty and life imprisonment without the possibility of release for crimes committed below the age of 18; Article 1 of the CRC and Article 2 of the ACRWC, which define a *child* as *any human being below the age of 18 years*.

<sup>463</sup> Rule 1.4 of the *Beijing Rules* states that, ‘Juvenile justice shall be conceived as an integral part of the national development process of each country.’

- (iii) The principle of non-discrimination and equality is applicable to juvenile justice, and this includes a prohibition on discrimination on account of the child and child's family;<sup>464</sup>
- (iv) The guiding principle for any policy or action concerning juvenile justice is that the best interests of the child is a paramount consideration;<sup>465</sup>
- (v) Delay in deciding matters relating to a child is prejudicial to the best interests of the child;<sup>466</sup>
- (vi) Every child shall be treated with humanity and with respect for the inherent dignity of the human person, taking into account the age of the child;<sup>467</sup>
- (vii) At all stages, children should be treated in a manner that facilitates their reintegration into society and their assuming a constructive role in society;<sup>468</sup>
- (viii) Children are entitled to express their views freely in relation to criminal justice, and the views of the child should be given due weight in accordance with both the age and the maturity of the child;<sup>469</sup>
- (ix) Children have the right to seek, receive and impart information concerning the juvenile justice system in a form that is both accessible and appropriate to children;<sup>470</sup>

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<sup>464</sup> Article 2 of the CRC; and Article 3 of the ACRWC.

<sup>465</sup> Article 3 (1) of the CRC.

<sup>466</sup> Ibid, Article 37 (d) and Article 40 (2) (b) (ii) and (iii); and Article 17 (2) (c) (iv) of the ACRWC.

<sup>467</sup> Article 37 (c) of the CRC; and Article 17 (1) of the ACRWC.

<sup>468</sup> Article 40 of the CRC; and Article 17 (3) of the ACRWC.

<sup>469</sup> Articles 12 and 13 of the CRC.

<sup>470</sup> Ibid, Article 13; and Guideline 11 (b) of the Guidelines for Action on Children in the Criminal

- (x) Juvenile justice should be organized in a manner consistent with children's rights to privacy, family, home and correspondence;<sup>471</sup>
- (xi) If children are deprived of their family environment they are entitled to special protection and assistance;<sup>472</sup>
- (xii) No child shall be subject to torture or to other cruel, inhuman, degrading or harsh treatment or punishment;<sup>473</sup>
- (xiii) At any stage of the juvenile justice process, children should not be unlawfully or arbitrarily deprived of their liberty;<sup>474</sup>
- (xiv) The arrest, imprisonment or detention of children should only be used as a measure of last resort and for the shortest appropriate period of time;<sup>475</sup> and
- (xv) Parents (or guardians) are to be notified of any arrest, detention, transfer, sickness, injury or death of their child.<sup>476</sup>

To supplement the International Umbrella Principles above stated, Penal Reform International (PRI) and members of the Interagency Panel on Juvenile Justice (IPJJ) have developed ten points<sup>477</sup> as their contribution to the Committee on the Rights of the Child Day of general Discussion on "State Violence against Children," in Geneva, 22<sup>nd</sup> September 2000. The points were deduced from the aforementioned

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Justice System.

<sup>471</sup> Article 16 of the CRC; and Article 17 (2) (d) of the ACRWC.

<sup>472</sup> Article 20 (1) of the CRC; and Article 17 (2) (c) (iii) of the ACRWC.

<sup>473</sup> Article 37 of the CRC; and Rule 87 (a) of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>474</sup> Article 37 (b) of the CRC.

<sup>475</sup> Ibid, Article 37 (b).

<sup>476</sup> Ibid, Article, 9 para 4 and Rule 56 of the UN Rules for the Protection of Juveniles Deprived of their Liberty.

<sup>477</sup> These points are contained a document entitled: 'Then-Point Plan for Fair and effective Criminal Justice for Children', available as a PRI's briefing note.

international instruments, focusing at ways of reducing violence within the juvenile justice system around the world.<sup>478</sup> In this regard, PRI and IPJJ believe that ‘a proper administration of juvenile justice cannot be achieved without a strong education and social welfare system. Helping young people in conflict with the law to become law abiding adults is much more the job of parents, teachers, social workers and psychologists than it is (for the) police, courts and prisons.’<sup>479</sup> With the ten point scheme, PRI and IPJJ seek to advance the point that ‘juvenile offending should be dealt with as far as possible outside the formal criminal justice and penal system,’ as it is important to make sure that ‘alternative systems – particularly those involving institutional care – take proper steps to protect children from violence and abuse.’<sup>480</sup>

### **3.6 Conclusion**

This Chapter has discussed the administration of modern juvenile justice in the historical context. The Chapter has also traced the state of the rights of children in conflict with the law in the pre-juvenile justice era, where a briefly review of the history of children’s rights as well as a prelude to modern juvenile justice at common law are provided. In this regard, it has noted that children who committed crimes in early common law were not given any special treatment because they were considered as adults. At common law, for instance, the minimum age of criminal responsibility was set as young as seven years, and children guilty of crimes were

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<sup>478</sup> Mashamba, C.J., The ten-point plan developed by PRA requires law and policy makers as well as criminal justice practitioners to: 1. develop and implement a crime prevention strategy for children; 2. collect accurate evidence and data on the administration of criminal justice for children and use this to inform policy reform; 3. increase the age of criminal responsibility; 4. set up a separate justice system for children with trained staff; 5. abolish status offences; 6. ensure that children have the right to be heard; 7. invest in diverting children from the formal criminal justice system; 8. use detention as a last resort; 9. develop and implement reintegration and rehabilitation programmes; and 10. prohibit and prevent all forms of violence against children in conflict with the law.

<sup>479</sup> Ibid.

<sup>480</sup> Ibid.

imprisoned. It has also observed that the principle of the best interests of the child or “the child’s welfare” was recognised by the common law courts in the early twentieth century.

The Chapter has further traced the conception of the juvenile justice system in the late 1800s, which strived to reform US policies regarding youth offenders. Prior to this period, misbehaving juveniles in the US, like in other parts of Western Europe, often faced arrest by the police, initial placement in the local jail with adults, and eventual institutionalisation in a house of refuge or workhouse. The Chapter has argued that in the US, juvenile justice in its earliest form was conceived and developed out of the need for a separate court for child offenders, away from the ordinary courts that dealt with offending adults. So, the first juvenile court was established in Cook County under the 1899 Illinois Juvenile Court Act; and by 1945 every State in the US had a juvenile court. From the early 20<sup>th</sup> century, the juvenile court was transplanted to Western Europe; and in England, it was given legal recognition through the enactment of legislation specific for juvenile justice.

The Chapter has also analysed the three models of juvenile justice from its inception – the welfarism, back to justice and corporatism – as they have impacted on the development of modern day juvenile justice. It has also discussed modern-day administration of juvenile justice in the context of the CRC, the Riyadh Guidelines, the Beijing Rules, the Rules and the ACRWC, particularly in African.

## CHAPTER FOUR

### 4.0 PROTECTION OF CHILDREN'S RIGHTS IN INTERNATIONAL LAW

#### 4.1 Introduction

In the contemporary set up of international law, children's rights form a very fast growing body of normative principles and standards. This is because the world community has, over the past twenty years or so, committed itself to ensuring that the rights of the child are fully protected, as children are now considered one of the key beneficiaries of human rights. This was not the case before the 20<sup>th</sup> century. Before this period, children's rights were not given any consideration within the legal systems around the world, which facilitated consistent and sometimes legally-accepted abuses against children.<sup>481</sup> This trend only changed from the latter part of the 19<sup>th</sup> century when human rights activists, legal scholars and jurists started to advocate for legal protection of children - beginning first with the rights of children in conflict with the law and later to all children's rights.<sup>482</sup>

In this Chapter we, thus, discuss the protection of children's rights from the 20<sup>th</sup> century up until to date and its impact on contemporary conceptualisation of children's rights. The Chapter will tentatively trace the genesis of the notion of, and rationale for, children's rights protection. It will also discuss modern trends in international children's rights, whereby the human rights protection mechanisms in the major international children's rights instruments – i.e. the CRC and the ACRWC

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<sup>481</sup> See Chapter One of this Thesis.

<sup>482</sup> As discussed in Chapters One and Three of this Thesis, the US was the first country to establish a juvenile court in 1889.

together with other international human rights instruments touching on children's rights – will be examined in the contexts of their efficacy, implementation and applicability in municipal laws.

#### **4.2 Modern Trends in International Protection of Children's Rights: An Overview**

As we discussed in Chapter One, children's rights were until recently seen as falling within the domain of charity. Before the 19<sup>th</sup> century, children were regarded as part of the family; thus, needing no specific protection. But with the increase in violation of children's rights – particularly of those children in conflict with the law – it was increasingly felt that children also needed special protection as offered to other vulnerable sections of society like women, the elderly and persons with disabilities. As a result of this new approach, child justice reformers in the US in the late 19<sup>th</sup> century onward and in England in the early 20<sup>th</sup> century propagated for reform of the criminal justice system with a view to affording special protection to children who came into contact with the criminal justice system. This resulted in the establishment of the juvenile court – first in the US and then in the UK and other European countries.<sup>483</sup>

The development in the criminal justice system towards recognising the rights of offending children influenced the thinking of many scholars and policy makers at the international level. Consequently, in 1924 the League of Nations adopted the Declaration of the Rights of the Child, followed by the 1959 United Nations

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<sup>483</sup> This development is discussed at length in Chapter Three of this study.

Declaration on the Rights of the Child. As a result of this development, the UN declared 1979 as the International Year of the Child, culminating in the adoption of the UN Convention on the Rights of the Child (CRC)<sup>484</sup> in November 1989 – forty-one years after the Universal Declaration of Human Rights (UDHR) was adopted in 1948 by the United Nations (UN) General Assembly. Notably, the CRC was the first ever binding children’s rights instrument to be adopted by the same UN General Assembly. One year later, in 1990, Africa adopted its own children’s rights instrument – the African Charter on the Rights and Welfare of the Child (ACRWC).<sup>485</sup> As it has been argued,

Quarrying the mine of their legitimacy from the inspiration of the UDHR, the two instruments have now formed a very central part to the claim for children’s rights at the municipal, regional and international levels. Many constitutions and laws that were enacted after the two instruments were adopted have made reference to, or contained principles envisaged in, the two instruments.<sup>486</sup>

These principal international children’s rights were preceded by other international instruments which provided for the protection of the rights of the child in general and juveniles in conflict with the law in particular. Besides, almost all international human rights instruments adopted before and after the adoption of these two instruments contain provisions generally protecting children’s rights and particularly the rights of children in contact with the penal law. Traditionally, the promotion and

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<sup>484</sup> The CRC was adopted and opened for signature, ratification and accession by UN General Assembly resolution 44/25 of 20<sup>th</sup> November 1989 and entered into force on 2<sup>nd</sup> September 1990, in accordance with Article 49. As of June 2008, 192 States had ratified the CRC, with only two countries – Somalia and the United States – being not States Party to it.

<sup>485</sup> The ACRWC came into force on 29<sup>th</sup> November 1999 and now has been ratified by 45 countries on the continent. List of countries that have ratified the ACRWC is available at <http://www.africanion.org/roo/Documents/Treaties/List/African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf> (accessed 14 June 2011).

<sup>486</sup> Mashamba, C.J., “Domestication of International Children’s Rights Norms in Tanzania.” *The Justice Review*. Vol. 8 No. 2, 2009, pp. 1-17.



protection mandate of children's rights is vested in treaty bodies established under the provisions of the relevant treaties as discussed in the succeeding sections.

### **4.3 The UN Human Rights System and Protection of Children's Rights**

The United Nations (UN) system for the protection of children's rights is embedded in the general human rights protection mechanism as well as through the specific children's rights protection mechanism under the CRC. This part, as such, discusses the two sets of protection of children's rights under the UN human rights system.

#### **4.3.1 The UN Human Rights Protection Mechanism**

The United Nations human rights protection mechanism contains two systems: the UN Charter-based system; and the UN treaty-based system. Under the Charter-based system, the UN Charter of 1945 sets the basis for human rights in a nutshell. One of the main objectives of the UN Charter is to secure international peace, development and human rights.<sup>487</sup> Unlike other subsequent UN instruments, the UN Charter does not emphasise on protection, but rather promotion of, and universal respect for, human rights.<sup>488</sup> To be able to pursue this objective, the UN created the Economic and Social Council (ECOSOC), 'which, along with other many tasks, is primarily responsible for human rights issues.'<sup>489</sup> Under Articles 56, 62 and 68 of the UN Charter, ECOSOC is empowered, *inter alia*, to set up

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<sup>487</sup> See Article 1(3) of the UN Charter (1945).

<sup>488</sup> Ibid. Articles 13 and 55.

<sup>489</sup> Nowak, M., *Introduction to the International Human Rights Regime*. Leiden/Boston: Martinus Nijhoff Publishers, 2003. p. 73.

commissions for the protection of human rights universally.<sup>490</sup> In this section we, thus, examine the UN human rights protection mechanism.

#### 4.3.1.1 An Historical Overview

In practice, though, ECOSOC soon delegated its human rights mandate to the Commission on Human Rights<sup>491</sup> that was established under the provisions of Article 68 of the UN Charter. Although the Commission, which was founded in 1946, was *de facto* a principal body regarding promotion of human rights universally, it required ‘formal approval from ECOSOC in all its decisions.’<sup>492</sup> As Nowak rightly reflects,

For many years, the Commission took the term ‘*promotion of human rights*’ far too literally, considering every action that went beyond advisory services (e.g. delegating experts and organising seminars upon the invitation of individual states) as inadmissible interference with the domestic jurisdiction of states in accordance with article 2(7) of the [UN] Charter. [Emphasis in the original text.].<sup>493</sup>

As such, during the first decades of its existence the Commission’s main achievement was to set standards – ‘i.e. to carry out a comprehensive *universal codification of human rights*, which was largely completed by the end of the Cold War.’<sup>494</sup> As a result of this task, up until the end of the Cold War towards the end of the 1980s, the UN has been able to establish an extensive network of international human rights instruments ranging from the *International Bill of Human Rights*<sup>495</sup> to

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<sup>490</sup> For a detailed discussion on this subject see Matsheza, P. and L. Zulu, *Human Rights Enforcement and Implementation Mechanisms*. Harare: Human Rights Trust of Southern Africa, 2001, pp.18-27.

<sup>491</sup> In 2006 the Commission on Human Rights was, however, replaced by the Human Rights Council (HRC), which was created by UN General Assembly Resolution 60/251 as an inter-governmental/political body. Its mandate is, more generally, to protect and promote human rights globally.

<sup>492</sup> Nowak, op. cit, p. 73.

<sup>493</sup> Ibid.

<sup>494</sup> Ibid.

<sup>495</sup> The *International Bill of Human Rights* consists of the UDHR, the International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR) and the International Covenant on Civil and Political Rights of 1966 (ICCPR).

special conventions,<sup>496</sup> bodies and procedures to monitor States Parties' adherence to these treaty obligations. The Commission has also, from 1960s, established a number of *thematic and country-specific mechanisms*, such as special rapporteurs, and working groups. These mechanisms are aimed at fostering worldwide protection of human rights, 'which are based directly on the UN Charter and increasingly diffused the argument of inadmissible interference in national matters (at least with gross and systematic human rights violations).'<sup>497</sup> In principle,

This gradual development was endorsed by the express recognition of the legitimacy of international measures for the protection of human rights during the 1993 Vienna World Conference on Human Rights. At the same time, the UN High Commissioner for Human Rights was established, hailing a new era for the UN human rights system, which from promotion and protection was to move on to international enforcement, and finally, to the prevention of human rights violations.<sup>498</sup>

This integration has, in effect, resulted in making the human rights concept at the UN system a reality as well as a field of operation, with many significant field operations having been undertaken over the past sixty years ranging from humanitarian to international criminal law enforcement aimed at universal protection of human rights. In fact, with this integration function, human rights are 'gradually assuming the significance the authors of the UN Charter and the Universal Declaration of Human Rights intended for them, but which then got lost in the times of the Cold War.'<sup>499</sup>

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<sup>496</sup>Currently, there are 8 core international human rights treaties under the UN human rights protection mechanism: International Covenant on the Elimination of All Forms of Racial Discrimination (CERD); International Covenant on Economic, Social and Cultural Rights (ICESCR); International Covenant on Civil and Political Rights (ICCPR); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Their Families (ICRMW); and Convention on the Rights of Persons with Disabilities.

<sup>497</sup> Nowak, op. cit, pp. 74-75.

<sup>498</sup> Ibid, p. 75.

<sup>499</sup> Ibid.

These achievements apart, the UN Charter did not define the term “human rights,” rather it presupposed it. The definition of human rights was, thus, to be embedded in the UDHR as we are going to see below.

#### **4.3.1.2 Extending the Concept of Human Rights in International Law**

As we have already seen, one of the major tasks of the Commission on Human Rights was to promote human rights, and in so doing, it was expected to develop a universally acceptable definition of human rights. In the very beginning, the idea to accomplish this task was framed in three successive steps: ‘to pronounce a non-binding declaration as a basis for a legally binding convention, and create international implementation mechanisms.’<sup>500</sup> Given the contending nature of the world order then, it was agreed on consensus that a non-binding universal declaration was feasible, with the drafting of two binding covenants to happen later. So, the UDHR was to be adopted in 1948 while the two binding conventions took almost twenty years later to be adopted in 1966 and ten more years thereafter to enter into force in 1976.

The UDHR was drafted along the contentious divides between the Eastern and Western Blocs then forming the crux of the Cold War. While the West emphasised on the human rights concept born of the Age of Enlightenment (i.e. civil and political rights or “first generation” rights), the East favoured the so-called “second generation” rights (economic, social and cultural rights). Therefore, on a par, Articles 1-21 of the UDHR contained more or less the “first generation” rights and with the

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<sup>500</sup> Ibid.

“second generation” rights being accepted as more or less on equal footing with the former. As Manfred Nowak wonders,

In doing so, they pre-empted the doctrine of interdependence and indivisibility of all human rights, which was not formally recognised until the 1993 Vienna World Conference, and in fact, is still a matter of controversy for most industrialised countries.<sup>501</sup>

In addition, in terms of Article 28 of the UDHR it is recognised that everyone, including a child, is entitled to a ‘social and international order in which the rights and freedoms set forth in this Declaration can be fully realised.’ In effect, this provision has laid down the basis for the “third generation” or “collective” rights claim. It is also to date ‘considered the foundation for the legitimacy of the international human rights regime in general.’<sup>502</sup> Interestingly, unlike the subsequent two UN conventions forming the *International Bill of Rights*, the UDHR contains rights that the former did not formally enshrine – like the right to property<sup>503</sup> and the right of asylum.<sup>504</sup>

Although the UDHR – being a mere resolution of the UN General Assembly – is not binding under international law, ‘it still represents an authoritative interpretation of the term “human rights” in the UN Charter, and thus can be considered indirectly constituting international treaty law.’<sup>505</sup> In addition, the UDHR has also formed the basis for the core activities of all the UN human rights bodies over the past sixty years, including the Commission on Human Rights (now the Human Rights Council) itself.

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<sup>501</sup> Ibid, p. 76.

<sup>502</sup> Ibid.

<sup>503</sup> Article 17 of the UDHR.

<sup>504</sup> Ibid, Article 14.

<sup>505</sup> Nowak, op. cit., p. 76.

At the same time, some of the UDHR's provisions – such as the prohibition of torture and slavery – ‘today enjoy the status of customary international law, yet despite certain legal opinions to the contrary.’<sup>506</sup> Furthermore, many of the constitutions enacted immediately after the adoption of the UDHR – particularly those of Asian and former African colonies – have referred to the UDHR as a source of moral, political and legal significance.<sup>507</sup>

Indeed, the UDHR has ever since constituted a major step forward in the promotion of human rights and the rule of law at the international, regional and national levels. It evidently comprises, in one consolidated text, nearly the entire range of what today are recognized as human rights and fundamental freedoms.<sup>508</sup> Traditionally, all binding human rights treaties under the UN human rights system have established treaty bodies mandated to monitor the implementation of the respective instruments at the domestic level. This is the case with reference to the CRC as analysed below.

#### **4.3.2 Major UN Children's Rights Instruments**

All children's rights instruments under the UN human rights protection mechanism fall under the treaty-based human rights system. Under the UN human rights protection mechanism, there have been developed and adopted a handful of international human rights instruments expressly providing for children's rights. These are the UN Convention on the Rights of the Child (CRC); the UN Guidelines

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<sup>506</sup> Ibid. But with the increase in ratifications of the ICCPR and the ICESCR, this academic debate on the status of the UDHR in international law is gradually losing ground.

<sup>507</sup> See for instance, Article 9(f) of the Constitution of the United Republic of Tanzania (1977).

<sup>508</sup> Eide, A. and A. Rosas, “Economic, Social and Cultural Rights: A Universal Challenge.” In Eide, A., et al (eds.), *Economic, Social and Cultural Rights: A Text Book*. 2<sup>nd</sup> edn. Leiden/Boston: Martinus Nijhoff Publishers, 2001, p.15.

for the Prevention of Juvenile Delinquency (the *Riyadh Guidelines*); the United Nation Standard Minimum Rules for the Administration of Juvenile Justice (the *Beijing Rules*); the UN Rules for the Protection of Juveniles Deprived of their Liberty (the *JDL Rules*); and the UN Guidelines for Action on Children in the Criminal Justice System. However, in the discussion below we confine ourselves to the CRC only, as it is a binding international instrument with a treaty monitoring body – i.e. the United Nations Committee on the Rights of the Child.

#### **4.3.2.1 The UN Convention on the Rights of the Child (CRC)**

This part examines the CRC from a historical point of view. It critically looks at the rationale behind the adoption of the CRC, its normative principles, the obligations it imposes on States Parties and its enforcement mechanism.

##### **(a) Adoption of the CRC**

The CRC was adopted by the United Nations General Assembly on 20<sup>th</sup> November 1989. It came into force on 2<sup>nd</sup> September 1990, less than a year after its adoption, becoming the only international human rights instrument to come into force at such a short period.<sup>509</sup> As Goonesekere contends, the CRC ‘was also the only Convention whose entry into force was accompanied by a major world conference that focused on implementation of the rights guaranteed by the treaty.’<sup>510</sup> In September 1990, Heads of State and Government from around the world gathered in New York at the

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<sup>509</sup> Goonesekere, S., “Introduction and Overview.” In United Nations Children’s Fund, *Protecting the World’s Children: Impact of the Convention on the Rights of the Child in Diverse Legal Systems*. New York: Cambridge University Press, 2007, pp. 1-33, p. 1.

<sup>510</sup> Ibid.

World Summit for Children, where they adopted a Declaration ‘with specific goals and targets on implementation’ to be achieved within the next decade.<sup>511</sup>

At this Summit UNICEF ‘played a major role in the Summit meeting, and initiated a process that helped to ensure that the CRC was ratified by all countries, except Somalia and the United States of America, by 2000.’<sup>512</sup> As Goonesekere points out: ‘This near-universal ratification within just a decade is unique in the history of a human rights treaty.’<sup>513</sup> As Doek contends, ‘[n]o other human rights treaty comes close to universal ratification’ and ‘the CRC is at the same time the human rights treaty with widest coverage.’<sup>514</sup> Therefore, it is trite to conclude that; the fact that the CRC is the most widely ratified of all international human rights instruments ‘is testimony to the high value placed on safeguarding the rights of children.’<sup>515</sup>

#### **(b) A Critique on the CRC**

The CRC, in effect, erased the obscurity of children’s rights in the area of international human rights law. This means that with the adoption of the CRC, children’s rights ‘have come to be regarded as part and parcel of international human rights law.’<sup>516</sup> Now, the CRC has influenced national constitutions and legislation,

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<sup>511</sup> Ibid.

<sup>512</sup> Ibid. Both Somalia and the US have signed the CRC. In fact, the CRC is the only human rights treaty signed by all states of the world. Nowak, op. cit, pp. 92-93.

<sup>513</sup> Goonesekere, op. cit.

<sup>514</sup> Doek, J., “The Protection of Children’s Rights and the United Nations Convention on the Rights of the Child: Achievements and Challenges.” *Saint Louis University Public Law Review*. Vol. 22, 2003.

<sup>515</sup> Tomkin, J., *Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned – A Legal Analysis*. Geneva: Quaker United Nations Office, 2009, p. 11.

<sup>516</sup> Sloth-Nielsen, J. and B.D. Mezmur, “Surveying the Research Landscape to Promote Children’s Legal Rights in an African Context.” *African Human Rights Law Journal*. Vol. 7 No. 2, 2007, pp. 330-353, p. 331.



whereby states around the world have been incorporating therein its underlying principles and standards.<sup>517</sup>

Although it has received near-universal ratification and domestication, to many scholars in Africa and Asia, the CRC is sometimes perceived as ‘a Convention that originated on the West and articulated legal norms and values on children that had evolved in the West.’<sup>518</sup> This is evidenced by the construction of some provisions in the CRC, particularly on adoption (Article 20) and on the role of extended family (Article 5). This argument is further verified by the fact that during the 10 years of its drafting Africa, for instance, was represented only by Algeria, Egypt, Morocco and Senegal.<sup>519</sup> Furthermore, ‘specific provisions on aspects peculiar to Africa were not sufficiently addressed in the UN instrument.’<sup>520</sup> These aspects include harmful traditional practices; the impact of armed conflicts on children’s rights and welfare; and responsibilities of children to parents, guardians, relatives and the society at large, which have been sufficiently addressed by the ACRWC.<sup>521</sup>

All in all, the CRC is a very useful international human rights instrument in elevating the rights of the child at the global level. The fact that it received near-universal ratification and the fact that many countries around the world have incorporated most

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<sup>517</sup> For instance, the Constitutions that have categorically imbedded the CRC in their domains include those Constitutions of Ghana, Kenya, Namibia, South Africa and Uganda. Many laws have also been enacted with specific provisions extended thereunto from the CRC: LCA, etc.

<sup>518</sup> Goonesekere. Op. cit. See also Alston, P. (ed.), *The Best Interests of the Child*. Oxford: Clarendon Press, 1994; Chirwa, D.M., “The Merits and Demerits of the African Charter on the Rights and Welfare of the Child.” *International Journal on Children’s Rights*. Vol. 10, 2002.

<sup>519</sup> Ibid. See also Mezmur, B.D., “The African Children’s Charter versus the UN Convention on the Rights of the Child: A Zero-sum-Game?” *SA Public Law*. Vol. 23, 2008, p. 22 (This article is also published in *The Justice Review*. Vol. 8 No. 2, 2009); and Sloth-Nielsen and Mezmur, op. cit (note 3).

<sup>520</sup> Sloth-Nielsen and Mezmur. Ibid.

<sup>521</sup> See, for instance, Article 31 of the ACRWC.

of its substantive principles and standards into their legal systems, ‘signals that the rights which contribute towards the protection of children have outgrown the discretionary powers of national legislators.’<sup>522</sup> This reality has been intensified by the popularity the CRC has received over the years of its existence over and above other international human rights instruments. This suggests a ‘high level of normative consensus among the various nations of the world (particularly in Africa) on the idea and content of children’s rights as human rights.’<sup>523</sup>

### **(c) Normative Principles of the CRC**

The CRC is the first UN human rights instrument to contain both civil and political rights, on the one hand, and economic, social and cultural rights, on the other. By this fact, it can correctly be argued that the CRC attempts ‘to meet the different needs of children and juveniles not only by establishing special guarantees for the protection of children (e.g. from violence in the family or at school, from abuse, exploitation, neglect or unacceptably poor circumstances), but also by protecting children in the development of their identity, autonomy and active participation in social life (e.g. by the right to privacy, freedom of expression, information, religion, association and assembly or by the right to be heard in judicial proceedings).’<sup>524</sup> This wide-ranging set of provisions contained in the CRC ‘reflects a broad spectrum of global perspectives on children’s rights.’<sup>525</sup>

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<sup>522</sup> Sloth-Nielsen and Mezger, *op. cit.*, p. 331.

<sup>523</sup> *Ibid.*

<sup>524</sup> Nowak, *op. cit.*

<sup>525</sup> Tomkin, *op. cit.*, p. 11.

This integration of core human rights into a single treaty is the benefit that the CRC received from the hitherto developments in international human rights law. The CRC also benefited from the new trends in consolidating and strengthening the universality and indivisibility of human rights. Set up in this context,

The CRC therefore does not adopt a completely culturally relativist approach but sets out, in general, universal standards and norms of achievements. Civil and political rights and socio-economic rights are included as equally important rights. Significantly, the Convention focuses on implementation and monitoring of children's rights through adequate allocation of national resources and cooperation and solidarity among the State, families and communities, civil society, and the international community. The concept of "evolving capacity" as a child grows from childhood to adolescence, and the definition of childhood in terms of an upper limit of 18 years, also focus on children's participation in implementing these norms and on monitoring performance.<sup>526</sup>

In principle, the CRC contains provisions that are essentially the logical outcome of the new approach in the development of international human rights standards.<sup>527</sup>

Indeed,

The CRC contains a comprehensive listing of obligations that states are prepared to recognize towards the child. These obligations are of both direct and indirect nature. Direct in such matters as those pertaining to providing education facilities and ensuring proper administration of juvenile justice. And indirect in cases which enable parents, the wider family or guardians to carry out their primary roles and responsibilities as caretakers and protectors of children.<sup>528</sup>

The range of rights covered by the CRC, in this regard, is described as the "*Four Ps*" – provision, protection, prevention and participation. As observed by Nigel Cantwell, it can thus be said that children have the right to be provided with certain things and services, ranging from a name and nationality to health care and education. They have the right to be protected 'from certain acts such as torture,

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<sup>526</sup> See Goonesekere, op. cit, p. 2.

<sup>527</sup> Mashamba, C.J., "Institutional Care and Support to Orphaned and Vulnerable Children in Tanzania: A Legal and Human Rights Perspective", op. cit. See also Mashamba, C.J., "Domestication of International Children's Rights Norms in Tanzania", op. cit, p. 9.

<sup>528</sup> Ibid.

exploitation, arbitrary detention and unwarranted removal from parental care. And children have the right to do things and to have their say, in other words to participate both in decisions affecting their lives and in society as a whole.’<sup>529</sup>

The CRC has four general principles: non-discrimination (Article 2); the child’s best interests (Article 3); the right to life (Article 6), survival, and development; and respect for the child’s opinion (Article 12). These general principles are sometimes considered as the “four pillars” of the CRC, which are of ‘fundamental importance for the implementation of the whole Convention.’<sup>530</sup> These pillars are extended in the basic rights and fundamental freedoms in the CRC, including the rights relating to the preservation of identity; rights in adoption; the child’s right to grow up with, and not to be separated from, his parents, except where necessary; and the rights to health, education, adequate standard of living and social security. Others are rights of children in conflict with the law; the rights against child sexual abuse, exploitation, abduction, sale and trafficking; the rights of disabled children, child soldiers and refugee children; and rights against child labour and violence against children.

*Who is a child under the CRC?* The CRC also defines a child as ‘every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.’<sup>531</sup> This definition has, however, received wide criticism from many scholars, who view it as ‘ambiguous and weak, lacking specific protection ... , such as in relation to child betrothals, child participation in armed

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<sup>529</sup> Cantwell, N., *Introduction to the UN Convention on the Rights of the Child*. Geneva: Defence for Children International, 1995, p.1.

<sup>530</sup> Mezmur, op. cit, p. 20.

<sup>531</sup> Article 1 of the CRC.

conflict and child labour.<sup>532</sup> Interestingly, a very strong definition of who a child is, is provided for by Article 2 of the ACRWC, which stipulates that a child is ‘every human being under 18 years.’ According to Lloyd, the definition in the ACRWC is more useful as ‘there are no limitations or attached considerations’<sup>533</sup> as is the case with the definition in the CRC.

The CRC also describes the principle of “the best interests of the child” in Article 3.

The Article provides expressly that,

3.1 In *all actions concerning children*, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration*. [Emphasis supplied.]

It can be gathered from the provisions of Article 3(1) of the CRC that the principle of the best interests of the child provides a ‘yardstick by which to measure all the actions, laws and policies affecting children.’<sup>534</sup> On his part, Philip Alston refers to this principle as the lens through which all other rights are viewed.<sup>535</sup> However, the use of an indefinite article “a” immediately before the words “primary consideration” – as opposed to the use of a definite article “the” in Article 4(1) of the ACRWC– has attracted criticism that it makes the application of the principle of the best interests of the child optional under the CRC as opposed to the ACRWC, which makes it mandatory.<sup>536</sup>

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<sup>532</sup> Lloyd, A., “The African Regional System for the Protection of Children’s Rights.” In Sloth-Nielsen, J. (ed.), *Children’s Rights in Africa: A Legal Perspective*. Hampshire, Ashgate Publishing Company, 2008, pp. 33-51, p. 35 (note 4). See also Mezmur, op. cit, p. 34 (note 106).

<sup>533</sup> Ibid.

<sup>534</sup> Mezmur, op. cit, p. 35.

<sup>535</sup> Alston, P., “The Best Interest Principle: Towards a Reconciliation of Culture and Human Rights.” *International Journal of Law, Policy and the Family*. Vol. 8 No. 1, 1994, p. 5.

<sup>536</sup> See particularly Lloyd, op. cit, pp. 36-37; and Mezmur, ibid, p. 36.

Although the basic source of the principle of “the best interests of the child” is Article 3(1) of the CRC, the principle is also referred to in numerous other provisions of the Convention<sup>537</sup> as well as in other UN/international human rights instruments.<sup>538</sup> For instance, Article 18 of the CRC, which provides that both parents (mother and father) are responsible for the upbringing and development of the child, requires that parents’ basic concern in this process must be the best interests of the child. Under Article 9 of the CRC, where it is necessary to separate the child from his or her parents, such separation must be in the best interests of the child. Pursuant to Article 20, where it is found to be in the best interests of the child to be separated from the home environment; such child is entitled to special protection by the state. In Article 2, the CRC provides the principle of non-discrimination in the following expression,

2.1 States Parties shall respect and ensure the rights set forth in the present Convention to each child *within their jurisdiction* without discrimination of any kind, irrespective of the child’s or his or her parent’s or guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. [Emphasis added].

This article implies that States Parties to the CRC have an obligation to always ensure that discrimination against children on any of the listed grounds is not allowed in all actions, decisions, policies, practices and/or legislative enactments concerning

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<sup>537</sup> This aspect is discussed at length in Tomkin, op. cit, pp. 19-28.

<sup>538</sup> For instance, Article 5(b) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) provides that States Parties shall take all appropriate measures: ‘To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that *the interest of the children* is the primordial consideration in all cases.’ In terms of Article 16(1)(d) of the CEDAW, States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women: ‘The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases *the interests of the children* shall be paramount.’ (Emphasis supplied).

children. However, unlike the ACRWC<sup>539</sup> (which extends the obligations to states and non-state actors), the CRC imposes the obligation to ensure that children are not discriminated on the state. At the same time, the CRC, in Article 2(1), ‘confines state parties to ensure children only “within their jurisdiction” receive rights in the CRC without discrimination.’<sup>540</sup>

In the CRC, there is also the principle of life, survival and development of children, which ‘ensures that children have the capacity to ascertain their rights and ensure the protection of their welfare.’<sup>541</sup> This principle does ‘not only prioritise children's rights to survival and development but also puts emphasis on the right to develop to their fullest potential in every respect, including their personalities, talents and abilities.’<sup>542</sup> This principle underpins that States Parties to the CRC should ensure that the inherent right to life guaranteed in Article 6(1) is guaranteed by abolishing, *inter alia*, death penalty. By extension, States Parties are obliged to ensure that, in order to guarantee this right, there is maximum survival and development of the child in their respective jurisdictions.<sup>543</sup>

Another equally fundamental principle of the CRC is participation of children in decision-making or in action concerning their rights and welfare.<sup>544</sup> This principle ‘sets out the principle that children should be listened to on any matter or decisions

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<sup>539</sup> Article 26(2) and (3), ACRWC.

<sup>540</sup> Lloyd, *op. cit.*, p. 37; Chirwa, *op. cit.*; and Mezmur, *op. cit.*, p. 35.

<sup>541</sup> Mezmur, *ibid.*, p. 37.

<sup>542</sup> Mashamba, C.J., *Introduction to Family Law in Tanzania*. Dar es Salaam: IPPL/nola, 2010, p. 84.

<sup>543</sup> Article 6(2), CRC.

<sup>544</sup> *Ibid.* Article 12.

which concerns or affects them, and that their views should be given due consideration in accordance with their age and maturity.’<sup>545</sup>

Interestingly, the CRC ‘also tries to find a balance in the sensitive triangle of children-parents-state.’<sup>546</sup> For instance, Article 5 (together with Article 18 in particular) provides a framework for the relationship between the child, his or her parents and family, and the State.<sup>547</sup> According to Hodgkin and Newell, Article 5 provides the CRC with a flexible definition of “family” and introduces to the Convention two vital concepts: parental “responsibilities” and the “evolving capacities” of the child.<sup>548</sup> The article provides that:

5. States Parties shall *respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom*, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with *the evolving capacities of the child*, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. [Emphasis supplied.]

The article, in the opinion of Hodgkin and Newell, also ‘signals clearly that the Convention regards the child as the active subject of rights, emphasizing the exercise “by the child” of his or her rights.’<sup>549</sup>

In the broad sense, ‘this article expounds that maintenance, care, custody and protection of the child is the primary responsibility and duty for parents, guardians and/or relatives.’<sup>550</sup> The UN Committee on the Rights of the Child (CROC) has

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<sup>545</sup> Mashamba, C.J., *Introduction to Family Law in Tanzania*, op. cit

<sup>546</sup> Nowak, op. cit, p. 93.

<sup>547</sup> Mashamba. *Introduction to Family Law in Tanzania*, op. cit, p. 86.

<sup>548</sup> Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*. 3<sup>rd</sup> edn. Geneva: United Nations Children’s Fund, 2007, p. 75.

<sup>549</sup> Ibid.

<sup>550</sup> Mashamba. *Introduction to Family Law in Tanzania*, op. cit, p. 87.



expanded the interpretation of the article in its General Comments. The role of parents in relation to the capacities and rights of babies and younger children is explained in the Committee's *General Comment No. 7* on "Implementing Child Rights in Early Childhood" thus:

The responsibility vested in parents and other primary caregivers is linked to the requirement that they act in children's best interests. Article 5 states that parents' role is to offer appropriate direction and guidance in 'the exercise by the child of the rights in the ... Convention'. This applies equally to younger as to older children. Babies and infants are entirely dependent on others, but they are not passive recipients of care, direction and guidance. They are active social agents, who seek protection, nurturance and understanding from parents or other caregivers, which they require for their survival, growth and well-being. Newborn babies are able to recognize their parents (or other caregivers) very soon after birth, and they engage actively in non-verbal communication. Under normal circumstances, young children form strong mutual attachments with their parents or primary caregivers. These relationships offer children physical and emotional security, as well as consistent care and attention. Through these relationships children construct a personal identity and acquire culturally valued skills, knowledge and behaviours. In these ways, parents (and other caregivers) are normally the major conduit through which young children are able to realize their rights.<sup>551</sup>

Under Article 18 of the CRC, both parents (father and mother) have common responsibilities for the upbringing and development of their children. The article provides, *in extenso*, that:

18.- 1. States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.

2. For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children.

3. States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

From the foregoing analysis it can be summed up that the CRC 'corresponds with the universal human rights in many areas and in addition, also includes a number of

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<sup>551</sup> See Committee on the Rights of the Child, General Comment No. 7, 2005: "Implementing Child Rights in Early Childhood." CRC/C/GC/7/Rev.1, para. 16.

rights specific to children.<sup>552</sup> This is why it contains, in Articles 37 and 40, provisions specific to offending children, who should be dealt with separately in a juvenile justice system that should not be part of the criminal justice system.

#### **(d) Obligations of States Parties to the CRC**

It is a general rule of international human rights law that every single human right has a corresponding duty and a duty-holding party. The nature and contents of duties are important in national and international human rights promotion and protection.<sup>553</sup> Traditionally, the prime duty-holder of human rights under international law is the state, which derives from the fact that states are the signatories to international human rights treaties; thus, bound by the said treaties.<sup>554</sup>

Under international human rights law, there are three categories of state obligations or duties to domesticate international norms contained in international treaties to which states are parties. In terms of the provisions of Article 26 of the Vienna Convention on the Law of Treaties (1960): ‘Every treaty in force is binding upon the parties to the treaty and must be performed in good faith.’ The said state obligations include: first and foremost, the obligation to *respect*; secondly, the obligation to *protect*; and, thirdly, the obligation to *fulfil*, human rights. The obligation to *respect* human rights requires States to refrain from interfering with human rights. For

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<sup>552</sup> Nowak, op. cit, p. 93.

<sup>553</sup> Mashamba, C.J., “Enforcing Social Justice in Tanzania: The Case of Economic and Social Justice.” LL.M. Thesis, Open University of Tanzania, 2007.

<sup>554</sup> This is by virtue of the Vienna Convention of the Law of Treaties under the principle of *pancta sunt servanda* (Article 26). See also Mashamba, C.J., “The Mandate of the ACERWC and How CHRAGG Can Collaborate with the ACERWC in Order to Highlight the Issue of Children Detained in Adult Prisons in Tanzania.” A Briefing Paper Presented by at the UNICEF-PRI Workshop on “Developing Advocacy Strategies” held at UNICEF Conference Hall, Dar es Salaam, 26-27 May 2011.

instance, the right to housing is violated if the State engages in arbitrary forced eviction.<sup>555</sup> The obligations to *protect* and *fulfil* human rights require States to prevent violations of such rights by third parties. For instance,

.... the failure to ensure that private employers comply with basic labour standards may amount to a violation of the right to work or the right to just and favourable conditions of work. The obligation to *fulfil* requires States to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights. Thus, the failure of States to provide essential primary health care to those in need may amount to a violation.<sup>556</sup>

The wording of the foregoing paragraph implies that both the obligations to *protect* and *fulfil* human rights impose a positive duty on the State to respectively *intervene* and *provide for* basic necessities in order to prevent violations of the rights by third parties.<sup>557</sup> It is proper to maintain, therefore, that:

By this, the state is obliged to make policies and legislation in order to regulate the relationship between individuals and ensure that individuals do not violate each others' rights; for example, the state is obliged to act if a landlord illegally evicts a tenant. Again, the courts can protect from improper invasion, in this case, from other parties than the state. The duty to fulfil human rights means that the .... State must take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of the rights.<sup>558</sup>

On its part, the African Charter on Human and Peoples' Rights, unlike other human rights instruments, imposes a positive duty on States Parties thereto to respectively *intervene* and *provide for* basic necessities in order to prevent violations of human rights; and it does not allow for state parties to derogate from their treaty obligations even during emergency situations. For instance, in the matter of *Commission Nationale des Droits de l'Homme et des Libertés v Chad*,<sup>559</sup> where there was a

<sup>555</sup> Paragraph 6 of the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights.

<sup>556</sup> Ibid.

<sup>557</sup> Mashamba, C.J., "Tanzania's Obligations for Juvenile Justice Reform in the Contexts of the Juvenile Justice and Access to Justice Studies under the CRC/ACERWC." A Briefing Paper Presented at the Child Justice Forum, Bagamoyo, 13 September 2011.

<sup>558</sup> Yigen, K., "Enforcing Social Justice: Economic and Social Rights in South Africa." *International Journal of Human Rights*. Vol. 4, No. 2, Summer 2000.

<sup>559</sup> (2000) AHRLR 66 (ACHPR 1995).

communication alleging that there had occurred accounts of killings and wanton torture of civilians as a result of the civil war between the security services and other rebel groups in Chad, the African Commission on Human and Peoples' Rights held that: 'even a civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter.'

The duty to *promote* human rights is another *positive* duty, which requires the State to actively support the rights, raise public awareness about the rights and how to access them, and cultivate a culture of respect for the rights. It may take many forms, such as educational activities, media awareness programmes, and public awareness raising campaigns.<sup>560</sup> In many jurisdictions to date, most of the promotional obligation for human rights is done by national human rights institutions, like the Indian Human Rights Commission, the Tanzanian Commission for Human Rights and Good Governance, the Ghanaian Commission for Human Rights and Administrative Justice, and the South African Human Rights Commission.<sup>561</sup>

In the context of this analysis, the CRC contains explicit and unambiguous positive obligations for states parties to undertake to ensure that the child's rights and freedoms are realised.<sup>562</sup> A cursory perusal of the provisions of the CRC indicates that most of the articles containing substantive rights are phrased in obligatory terms: "States Parties shall undertake ..."; "States Parties shall ensure ..." and "States

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<sup>560</sup> See the decision of African Commission on Human and Peoples' Rights in *Social and Economic Rights Action Centre (SERAC) and Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

<sup>561</sup> Mashamba, C.J., "Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights", *op. cit.*

<sup>562</sup> Mezmur, *op. cit.*, p. 25.

Parties undertake to ...” respect children’s rights or take appropriate measures or actions for child rights protection. In this sense, “measures” which States Parties are obliged to undertake include enacting legislation, adopting policies and undertaking programmes aimed at realising children’s rights in their jurisdictions. This also includes an obligation on States Parties to allocate sufficient budgets for child-related matters.

#### **(e) Procedural Framework for Monitoring the Implementation of the CRC**

Under the UN human rights protection mechanism, each of the *core* human rights instruments has a treaty monitoring body. Traditionally, treaty bodies are independent bodies of experts, who are elected from amongst nationals of the States Parties to the respective international human rights treaty. The experts’ work for the treaty bodies – usually, referred to as committees – is ‘usually done on honorary and voluntary basis.’<sup>563</sup> Conventionally, the only mandatory monitoring procedure of provided in all the *core* treaties under the UN human rights system ‘is that of examining states reports.’<sup>564</sup> As Nowak points out,

Each treaty provides that states submit **initial reports** on the steps they have taken to implement the rights recognised by the treaty within one or two years of the entry into force of the treaty, to be followed by regular periodic reports every two to five years. The reports are to point to progress, as well as to problems and difficulties that may arise in the context of implementation of the treaty. They are also to include sufficient legal, statistical and other accurate information as may be useful for the Committees in gaining a comprehensive impression of the human rights situation and implementation of the relevant treaty at the domestic level.<sup>565</sup>

The reports are, ideally, to be a result of a comprehensive national discussion process involving a wide range of state and non-state actors such as parliament, national

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<sup>563</sup> Nowak, op. cit, p. 96.

<sup>564</sup> Ibid, p. 97.

<sup>565</sup> Ibid.

human rights institutions, and the civil society. However, in most cases, many states have been preparing the reports behind closed doors involving only government officials. This has resulted in many reports to lack a comprehensive, critical and objective human rights assessment, ‘which is the real objective of every state reporting procedure’<sup>566</sup> under the UN human rights system.

In this arrangement, the duty of the treaty monitoring bodies ‘is to critically examine the state reports in public sessions’<sup>567</sup> and issue concluding observations and recommendations for the relevant states and publish them in their annual reports. After the concluding observations and recommendations are issued, ‘Governments are expected to pay heed to these recommendations and give an account of their state of implementation in the follow-up report. NGOs also play an important monitoring role in this, particularly at the national level.’<sup>568</sup>

The treaty bodies also publish “general comments”<sup>569</sup>; or “general recommendations”<sup>570</sup> on specific provisions in the treaties, which, along with the decisions taken during the complaints procedures, ‘constitute the main source of interpretation for the rights and other provisions contained in the respective treaties.’<sup>571</sup>

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<sup>566</sup> Ibid.

<sup>567</sup> Ibid.

<sup>568</sup> Ibid.

<sup>569</sup> See particularly Article 40(4) of the International Covenant on Civil and Political Rights (ICCPR); Article 19(3) of the Convention against Torture (CAT); and Article 45(d) of the CRC.

<sup>570</sup> See particularly Article 19 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 9(2) of the Convention against Racial Discrimination (CERD); and Article 21(1) of the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

<sup>571</sup> Nowak, op. cit, p. 99.

In case of the CRC, it is monitored by the CROC, which is established under Article 43(1). The Committee is comprised of eighteen experts ‘of high moral standing and recognised competence in the field covered by [the] Convention.’<sup>572</sup> These experts are elected by States Parties from among their nationals who serve in their personal capacity. In electing the members to the Committee, regard should be had to ‘equitable geographical distribution, as well as to the principal legal systems.’<sup>573</sup> The tenure of members of the Committee is four years, with a possibility of re-election.<sup>574</sup> The Committee meets in Geneva, Switzerland, three times per annum (January, May and September) for a period of three weeks per each session.<sup>575</sup>

Under Article 44 of the CRC, States Parties are obliged to submit to the CROC, through the Secretary-General of the UN, ‘reports on the measures they have adopted which give effect to the rights recognised herein and on the process made on the enjoyment of those rights.’ The periodicity for state reporting is two-phased : (i) within two years of the entry into force of the Convention for the State Party concerned ; and (ii) thereafter every five years.<sup>576</sup> The contents of a report should comply with the requirements of Article 44(2), which stipulates that,

2. Reports made under the present article shall indicate factors and difficulties, if any, affecting the degree of fulfilment of the obligations under the present Convention. Reports shall also contain sufficient information to provide the Committee with a comprehensive understanding of the implementation of the Convention on the country concerned.

Unlike the African Committee of Experts on the Rights and Welfare of the Child

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<sup>572</sup> Article 43(2), CRC.

<sup>573</sup> Nowak, *op. cit.*

<sup>574</sup> *Ibid.* See also Article 43(6), CRC.

<sup>575</sup> Mashamba, C.J., "Introduction to Shadow Reporting." A paper presented at a mentoring course for nola lawyers, held in Morogoro, 4-7 August 2008.

<sup>576</sup> Article 44(1)(a) and (b), CRC.

(ACERWC),<sup>577</sup> until recently the CROC did not have inter-state or individual complaints communication procedures.<sup>578</sup> Only in 2011 an Optional Protocol to the CRC was adopted to allow such procedure; but it is yet to become operational for insufficient ratifications. Nonetheless, the CROC issues very useful General Comments in interpreting the CRC. It also holds an annual Day of General Discussion, which involves a number of stakeholders, including NGOs. The CROC further actively involves NGOs in the pre-sessions, which are held in camera between the Committee and the representatives of the NGOs. The aim of these pre-sessions is to enable the CROC to receive alternative information to complement the States Parties' reports; and, thus, prepare list of issues or questions to be taken to the respective States Parties for consideration during the open sessions.<sup>579</sup> Under Article 44(5), the CROC is obliged 'to submit to the [UN] General Assembly, through the Economic and Social Council, every two years, reports on its activities.'

#### **4.3.2 Protection of Children's Rights in "Other" UN Human Rights Treaties**

Apart from having child rights-specific international human rights instruments, the UN treaty-based human rights system also has a number of instruments containing certain provisions that protect the rights of the child. As we have seen above, the CRC was adopted as a direct influence of the UDHR and as a result of the world community's endeavour to have child rights-specific mechanism for the protection of children's rights; and, as such, it now forms part and parcel of the UN human rights protection mechanism in place today. So, it is not accidental that children's rights are

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<sup>577</sup> Lloyd, op. cit.

<sup>578</sup> Nowak, op. cit, p. 92 ; and Lloyd, *ibid*, p. 48.

<sup>579</sup> Mashamba, C.J., "Introduction to Shadow Reporting", op. cit.



also protected in other international and regional human rights instruments. As such, children's rights are also protected in the context of 'rights catalogued and guaranteed in the international human rights instruments'<sup>580</sup> as well as those in the [UDHR].<sup>581</sup> These international human rights instruments form the international normative framework for children's rights. In principle, some of these instruments also 'contain certain child specific rights which amplify their relevance for children's rights protection.'<sup>582</sup> To the extent that they have been ratified by the relevant African states, these universal human rights instruments hold guarantees for the right[s] of children in those states.'<sup>583</sup>

All these instruments have treaty bodies, which oversee the implementation of the respective treaties at the municipal level. Thus, through the state reporting mandate the treaty bodies also ensure that children's rights are adequately protected.

#### **4.4 The African Regional Human Rights System and the Protection of Children's Rights**

Since the inception of colonialism in the late 19<sup>th</sup> century, the concept of human rights in Africa has been overshadowed by contending views. While some scholarly

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<sup>580</sup> Some of these instruments include International Covenant on Economic, Social and Cultural Rights of 1966 (ICESCR); the International Covenant on Civil and Political Rights of 1966 (ICCPR); the UN Convention on the Elimination of All Forms against Women (CEDAW); the Convention on the Elimination of Forms of Racial Discrimination (CERD); the Convention against Torture and Other forms of Cruel, Inhuman and Degrading Treatment or Punishment (CAT); and the International on the Protection of the Rights of All Migrant Workers and their Families (CMW). Other instruments that can also be used to base child rights actions whenever they enter into force, are the African Youth Charter (adopted in July 2006); and the Convention on the Rights of Persons with Disabilities (adopted in 2006 and came into force in November 2007).

<sup>581</sup> Ebobrah, S.T., "Taking Children's Rights Litigation Beyond National Boundaries: The Potential Role of the ECOWAS Community Court of Justice", op. cit, p. 142.

<sup>582</sup> See for instance, Articles 10 and 13 of ICESCR; Article 24 of ICCPR; Article 16 of CEDAW; and Articles 29 and 30 of CMW.

<sup>583</sup> Ebobrah, op. cit, p. 143.

works on the subject of human rights in Africa have contended that there is a remote realisation of the principle of universality over “indigenouness” of human rights in Africa,<sup>584</sup> some have ‘engaged the impracticability of certain categories of human rights in and for Africa and the mass of impediments to human rights protection in African states.’<sup>585</sup> Some scholarly works about the African human rights history have concentrated on ‘documenting the history and spate of state-sponsored violations of human rights particularly as they relate to democratisation, electioneering and the political process’<sup>586</sup> in Africa.<sup>587</sup> However, as a contribution to the ever increasing body of human rights norms at the international level, the African human rights system should be regarded as unique and a potent tool for vindicating human rights in an African context. In this section we, therefore, briefly discuss the African human rights system and its essence in making children’s rights a reality in an African context.

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<sup>584</sup> See, for instance, Shivji, I.G., *The Concept of Human Rights in Africa*. London: CODESRIA, 1989; Cobah, J.A.M., “African Values and the Human Rights Debate: An African Perspective.” *Human Rights Quarterly*. Vol. 9 No. 3, 1987, pp. 309-31; Howard, R., *Human Rights in Commonwealth Africa*. Ottawa: Rowman and Littlefield, 1986; and Busia Jr, N.K.A., “The Status of Human Rights in Pre-Colonial Africa: Implications for Contemporary Practices.” In McCarthy-Arnolds, E. et al. (eds.), *Africa, Human Rights and the Global System*. Westport, CT: Greenwood Press, 1994.

<sup>585</sup> Olowu, D., “The Regional System of Protection of Human Rights in Africa.” In Sloth-Nielsen, J., *Children’s Rights in Africa: A Legal Perspective*. Hampshire: Ashgate Publishing Limited, 2008, pp. 13-32, p. 13. See also Busia Jr. Ibid; Eze, O., *Human Rights in Africa: Some Selected Problems*. New York: St. Martin’s Press, 1984; Eze, O., “Human Rights Issues and Violations the African Experience.” In Shepherd Jr., G.W. and M.O.C. Anikpo (eds.), *Emerging Human Rights: The African Political Economy Context*. Westport, CT: Greenwood Press, 1990; Donnelly, “The Right to Development.” In Welch Jr., C.E. et al (eds.), *Human Rights and Development in Africa*. Albany, NY: State University of New York, 1984; and El-Obaid, E.A. et al, “Human Rights in Africa: A New Perspective on Linking the Past to the Present.” *McGill Law Journal*. Vol. 41, 1996, pp. 819-54.

<sup>586</sup> Olowu, *ibid*.

<sup>587</sup> Gutto, S.B.O., *Human Rights for the Oppressed: Critical Essays on Theory and Practice from Sociology*. Lund: Lund University Press, 1993, pp. 47-9; and Udombana, N.J., “Articulating the Right to Democratic Governance in Africa.” *Michigan Journal of International Law*. Vol. 24, 2003, pp. 1209-70.

#### 4.4.1 The African Human Rights System

This part critically examines the African Regional Human Rights Systems and its role in the protection of human rights, generally, and children's rights, in particular. The potent role of regional human rights systems is also examined. In this context it is argued that the normative framework for the protection of human rights in the African regional human rights system is premised in the objectives of the Constitutive Act of the AU,<sup>588</sup> one of which is to 'promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights [ACHPR] and other relevant human rights instruments,'<sup>589</sup> including the ACRWC. The ACHPR's principal implementation mechanism, which is carried out through the AComHPR, is also examined. Established under Article 30 of the ACHPR, the AComHPR has the tripartite mandate to promote, to ensure and to interpret the human and peoples' rights in the ACHPR.<sup>590</sup>

##### 4.4.1.1 An Historical Overview

The African human rights system is premised around the key functions of the African Union (AU), whose membership comprises of all African states, except Morocco. Established in 2002, the AU is a successor of the Organisation of African Unity (OAU), which was founded in 1963. The OAU placed special emphasis on fighting colonialism, racism and apartheid. But its Charter did not make any mention

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<sup>588</sup> Adopted in Lome, Togo, on 11<sup>th</sup> July 2000 and entered into force on 26<sup>th</sup> May 2001. The Assembly of the AU held its inaugural meeting in Durban, South Africa in July 2002.

<sup>589</sup> Article 3(h) of the Constitutive Act of the AU. See also Olowu, D., "Regional Integration, Development and the African Union Agenda: Challenges, Gaps and Opportunities." *Transnational Law and Contemporary Problems*. Vol. 13 No. 1, 2003, pp. 211-53; and Murray, R., *Human Rights in Africa: From the OAU to the African Union*. Cambridge: Cambridge University Press, 2004.

<sup>590</sup> Article 45(1) – (3), ACHPR.

whatsoever to human rights.<sup>591</sup> This justifies the interest of powers that be at that time in Africa. At that moment, the main interest of the independent states in Africa was to gain and maintain political power; thus, the OAU Charter's focus was 'on the protection of the state, rather than the individual.'<sup>592</sup> Although African leaders at independence propagated the right to self-determination for Africans from European colonial powers, 'they were not inclined to take this right further than political independence.'<sup>593</sup> In this regard,

They did not grant their own peoples the right to self-determination vis-à-vis the new African States (as the Biafra war in Nigeria showed in all brutality), nor did they allow African people any individual rights within these new states that might be enforced by regional monitoring bodies. ... Instead, they seemed to be of the opinion that by abolishing colonialism and apartheid they would automatically guarantee individual human rights as well. Sadly enough, the most serious and systematic violations of human rights, such as those committed by atrocious regimes of *Idi Amin* in Uganda and "Emperor" *Bokassa* in Central Africa, had to occur to convince African leaders that these assumptions had been long.<sup>594</sup>

This tendency, in fact, was a result of a long-established legal system that was premised around fragmenting society along patriarchal systems and divide-and-rule tactics employed by the colonial powers across Sub-Saharan Africa during colonialism. At independence, the new African elites, who formed part of the local colonial administration, retained the colonial legal systems for their benefit and disliked the incorporation of basic rights and fundamental freedoms in their domestic legal systems.<sup>595</sup> As Bowd rightly points out,

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<sup>591</sup> Nowak, op. cit, p. 203. See also Olowu, op. cit, p. 15; Evans, M.D. and R.H. Murray, *The African Charter on Human and Peoples' Rights: The System at Work*. Cambridge: Cambridge University Press, 2002; and Murray, R., *Human Rights in Africa: From the OAU to the African Union*. Cambridge: Cambridge University Press, 2004.

<sup>592</sup> Du Plessis, M., "A Court Not Found?" *African Human Rights Law Journal*. Vol. 7 No. 2, 2007, pp. 522-543, p. 523.

<sup>593</sup> Ibid.

<sup>594</sup> Nowak, op. cit.

<sup>595</sup> See particularly Bowd, R., "Status Quo or Traditional Resurgence: What is Best for Africa's Criminal Justice Systems?", op. cit., p. 43; and Shaidi, L.P., "Traditional, Colonial and Present-day Administration of Criminal Justice", op. cit, p. 16.

The continued application of colonial legal systems suited the new elite ruling class [in Africa] because throughout the period of colonialism it was often these elites who had been tasked with the management of the country under supervision of a semi-absent landlord. In maintaining the existing systems, such elites found themselves in an advantageous position from which they could, with relative ease, ensure their position and consolidate power: not always for the benefit of the populations they were meant to be serving.<sup>596</sup>

This thinking was, consequently, extended even to the legal set up of the OAU. As a result, during the two decades of African independence, many African elites turned out to be dictators, violating human rights with impunity in the process. In particular, systematic violations of human rights were more overt in Guinea, Equatorial Guinea, Mobutu's Zaire [now Democratic Republic of Congo], Chad and Mauritania.<sup>597</sup> This reality compelled several legendary heads of states in Africa – particularly, Julius Nyerere (Tanzania) and Leopold Senghor (Senegal) – to initiate a human rights campaign for Africa that materialised in the adoption of the African Charter on Human and Peoples' Rights (ACHPR) in Banjul, The Gambia, in 1981.<sup>598</sup> The Charter, also known as the Banjul Charter, came into force in 1986. The Charter is now ratified by all 53 members of the AU<sup>599</sup>, except Morocco, which is the only African country that is not a member of the AU after it pulled out of the defunct OAU due to the recognition and admission of the Saharawi Arab Democratic Republic (SADR) into the OAU.<sup>600</sup>

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<sup>596</sup> Bowd, *ibid.*

<sup>597</sup> See particularly Olowu, *op. cit.*, p. 15; Heyns, C., "The African Regional Human Rights System: The African Charter." *Penn State Law Review*. Vol. 108, 2004, pp. 679-702; Shivji, I.G., *The Concept of Human Rights in Africa*, *op. cit.*; and Udombana, N.J., "A Harmony or Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa's Development." *Indiana International and Comparative Law Review*. Vol. 23, 2002, pp. 185-236.

<sup>598</sup> Nowak, *op. cit.*, pp. 204-05.

<sup>599</sup> On 9<sup>th</sup> July 2011 the state of South Sudan was declared, becoming the 54<sup>th</sup> member state of the AU.

<sup>600</sup> See particularly Olowu, *op. cit.*; Zoubir, Y.H., "The Western Sahara Conflict: A Case Study of Failure of Prenegotiation and Prolongation of Conflict." *California Western International Law Journal*. Vol. 26, 1996, pp. 173-213, pp. 189-90; and Munya, P.M., "The Organisation of African Unity and its Role in regional Conflict resolution and Dispute Settlement: A Critical Evaluation." *Boston College Third World Law Journal*. Vol. 19, 1999, pp. 537-91, p. 563-4.

The adoption of the ACHPR is very important in enriching the “African regional human rights system,” which means ‘the past, present and ongoing collective or concerted efforts by African peoples and states to secure human rights and freedoms for all peoples under a coherent arrangement [are achieved].’<sup>601</sup> This system ‘revolves around diverse institutions and normative frameworks’ within the AU set up based on ‘treaties that are elaborated and explained by other non-binding documents, such as resolutions, declarations and guidelines.’<sup>602</sup> The normative principles of human rights in these instruments are enforced by diverse institutions of the AU, which are: the AU itself, the African Commission on Human and Peoples’ Rights (AComHPR), the African Court on Human and Peoples’ Rights (ACtHPR),<sup>603</sup> and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). These institutions are also complemented by a number of existing specialised agencies or personnel ‘whose mandates are specifically aimed at human rights protection and promotion in Africa.’<sup>604</sup>

#### **4.4.1.2 The Potent Role of the African Regional Human Rights System**

The African regional human rights system is amongst the three currently existing regional human rights systems in the world. The other two are the American and European regional human rights systems. As Shelton argues, these regional human rights systems are thought to be essentially potent than the UN human rights

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<sup>601</sup> Olowu, *op. cit.*, pp. 14.

<sup>602</sup> *Ibid.*, p.14.

<sup>603</sup> As shall be seen later in this Chapter, the Court was merged by the African Union Court of Justice to form a composite African Court of Justice and Human Rights.

<sup>604</sup> Olowu, *op. cit.*, p. 15.

system,<sup>605</sup> ‘because they are able to take better account of regional conditions.’<sup>606</sup>

The UN itself has recognised regional arrangements for the protection of human rights through a resolution made by the UN General Assembly at its 92<sup>nd</sup> Plenary Meeting held in December 1992.<sup>607</sup> This was reaffirmed at the June 1993 World Conference on Human Rights in Vienna, where it was stated, *inter alia*, that regional and sub-regional human rights systems can play a very important role in the promotion and protection of human rights; and, as such, they should complement and reinforce universal human rights standards.<sup>608</sup>

#### **(a) The Normative Framework of the African Charter on Human and Peoples’ Rights**

The normative framework for the African regional human rights system is premised in the objectives of the AU, which are set out in Article 3 of the Constitutive Act of the AU.<sup>609</sup> Accordingly, one of the objectives of the AU is to ‘promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments.’<sup>610</sup> The reference to

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<sup>605</sup> Shelton, D., “The Premise of Regional Human Rights Systems.” In Weston, B.H. et al (eds.), *The Future of International Human Rights*. Ardsley, NY: Transnational Publishers, 1999, pp. 351-98.

<sup>606</sup> Olowu, op. cit, p. 15.

<sup>607</sup> UN General Assembly Resolution A/RES/47/125.

<sup>608</sup> Mezmur, op. cit, p. 22; Olowu, op. cit, p. 15; Sloth-Nielsen and Mezmur, op. cit, p. 351; and Weston, B.H., et al, “Regional Human Rights Regimes: A Comparison and Appraisal.” *Vanderbilt Journal of Transnational Law*. Vol. 20 No. 4, pp. 585-637.

<sup>609</sup> Adopted in Lome, Togo, on 11<sup>th</sup> July 2000 and entered into force on 26<sup>th</sup> May 2001. The Assembly of the AU held its inaugural meeting in Durban, South Africa in July 2002.

<sup>610</sup> Article 3(h) of the Constitutive Act of the AU. See also Olowu, D., “Regional Integration, Development and the African Union Agenda: Challenges, Gaps and Opportunities.” *Transnational Law and Contemporary Problems*. Vol. 13 No. 1, 2003, pp. 211-53; and Murray, R., *Human Rights in Africa: From the OAU to the African Union*. Cambridge: Cambridge University Press, 2004.

“other relevant human rights instruments” includes the African Charter on the Rights and Welfare of the Child (ACRWC).

It is in this context that at the apex of the institutional arrangement for the African regional human rights system is the Assembly of Heads of State and Government. Below the Assembly are other principal organs of the AU that have ‘critical roles to play in the promotion and protection of human rights in Africa.’<sup>611</sup> These organs include: the Executive Council; the AU Commission that serves as the Secretary of the AU; the African Court on Human and Peoples’ Rights; the Pan-African Parliament; the Peace and Security Council; the African Commission on Human and Peoples’ Rights; the African Committee of Experts on the Rights and Welfare of the Child; the Economic, Social and Cultural Council (ECOSOCC); and other specialised and technical committees. Under the AU set-up, the human rights, democracy and good governance mandate is under the Political Affairs portfolio.

As stated in Article 3(h) of the Constitutive Act of the AU, the African Charter on Human and Peoples’ Rights (ACHPR) is specifically “conceived as the bedrock” of the human rights protection agenda in Africa.<sup>612</sup> It is, in fact, a ‘primary human rights instrument for Africa.’<sup>613</sup> As Akinseye-George points out, the Charter has positively impacted on ‘the development of constitutional law with particular reference to

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<sup>611</sup> Olowu (2008), p. 16.

<sup>612</sup> See Olowu, D., “Regional Integration, development and the African Union Agenda: Challenges, Gaps and Opportunities”, op. cit; and Murray, R., *Human Rights in Africa: From the OAU to the African Union*, op. cit.

<sup>613</sup> Bowman, R., *Lubanga*, the DRC and the African Court: Lessons Learned From the First International Criminal Court Case.” *African Human Rights Law Journal*. Vol. 7 No. 2, 2007, pp. 412-445, p. 426. See also Akinseye-George, Y., “New Trends in African Human Rights Law: Prospects of an African Court of Human Rights.” *University of Miami International and Comparative Law Review*. Vol. 10, 2001-2002.



human rights'<sup>614</sup> in an African context, whereby most African countries have incorporated some its norms into their constitutions and laws.

Conceptually, the ACHPR 'bears greater resemblance to the contents of the Universal Declaration of Human Rights (UDHR) of 1948 than to the European and inter-American regional human rights systems.'<sup>615</sup> Like the UDHR, the ACHPR emphasises on *equality of all human rights* in its preambular paragraph in the following regards: 'Civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is guaranteed for the enjoyment of civil and political rights.'

In principle, this foundation 'represents one of the most distinctive features of the normative renditions of the ACHPR.'<sup>616</sup> In this regard, the ACHPR endorses the underlying principles of *universality, inalienability, interdependence* and *indivisibility* of human rights.

Another distinctive feature of the ACHPR is its inclusion of *duties* of the individual person 'towards his family and society, the state and other legally recognised communities and the international community.'<sup>617</sup> In this regard, the ACHPR emphasises that the 'rights and freedoms of each individual shall be exercised with due regard to the rights of others, collective security, morality and common

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<sup>614</sup> Akinseye-George, *ibid*, p. 168.

<sup>615</sup> Olowu (2008), *op. cit*, p. 16.

<sup>616</sup> *Ibid*.

<sup>617</sup> Article 27(1), ACHPR.

interest.’<sup>618</sup> Another duty of the individual person is to ‘respect and consider his fellow beings without discrimination, and maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.’<sup>619</sup> Article 29 of the Charter has a catalogue of duties of an individual in the following respects:

**Article 29**

The individual shall also have the duty:

1. To preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need;
2. To serve his national community by placing physical and intellectual abilities at its service;
3. Not to compromise the security of the state whose national or resident he is;
4. To preserve and strengthen social and national solidarity, particularly when the latter is threatened;
5. To preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law;
6. To work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the society;
7. To preserve and strengthen positive African cultural values in his relations with other members of society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well-being of society;
8. To contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African unity.

Furthermore, the ACHPR contains human rights as well as peoples’ rights, which is unique as compared to other regional human rights instruments. Whereas “human rights” in the ACHPR are couched as entitlements of “every individual”<sup>620</sup> and “of all peoples”,<sup>621</sup> “peoples’ rights,” or “solidarity rights” or “collective rights” are framed as the inalienable right to self-determination and socio-economic development;<sup>622</sup> the right to economic, social and cultural development as well as the right to development;<sup>623</sup> the right to national and international peace and security;<sup>624</sup> and the right to a satisfactory environment.<sup>625</sup>

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<sup>618</sup> Ibid, Article 27(2).

<sup>619</sup> Ibid, Article 28.

<sup>620</sup> Ibid, Articles 2-18.

<sup>621</sup> Ibid, Articles 19-24.

<sup>622</sup> Ibid, Articles 19-20.

<sup>623</sup> Ibid, Article 22.

Interestingly, the ACHPR does not contain derogation clauses, as is the case with many international human rights treaties, which means that ‘no African government is permitted to abridge these rights even during emergencies.’<sup>626</sup> This argument was reinforced by the African Commission on Human and Peoples’ Rights in *Media Rights Agenda and Constitutional Rights Project v Nigeria*,<sup>627</sup> where it held that ‘[i]n contrast to other international human rights instruments, the ACHPR does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies or special circumstances.’<sup>628</sup> While the ACHPR contains certain “claw-back” clauses<sup>629</sup> in some civil and political rights, ‘there are no such claw-back clauses in respect of the economic, social, cultural and collective rights provisions in Articles 15 to 24. These guarantees are all in plain, unrestricted, and unconditional language.’<sup>630</sup>

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<sup>624</sup> Ibid, Article 23.

<sup>625</sup> Ibid, Article 24. See particularly Kiwanuka, R.N., “The Meaning of “People” in the African Charter on Human and Peoples’ Rights.” *American Journal of International Law*. Vol. 82, 1980, pp. 80-101; Benedek, W., “Peoples’ Rights and Individual Duties as Special Features of the African Charter on Human and Peoples’ Rights.” In Kunig, P., et al. (eds.), *Regional Protection of Human Rights by International Law: The Emerging African System*. Baden-Baden: Nomos Verlagsgesellschaft, 1985, pp. 59-94; Mutua, M., “The Banjul Charter and the African Cultural Fingerprints: An Evaluation of the Language of Duties.” *Virginia Journal of International Law*. Vol. 35, 1995, pp. 339-80; Heyns, op. cit; and Olowu, op. cit, p. 17.

<sup>626</sup> Olowu, ibid, p. 17. See also Umuzorike, op. cit, p. 910.

<sup>627</sup> Communication 105/1993 (October 1998) (reported elsewhere as (2000) AHRLR 200 (ACHPR 1998).

<sup>628</sup> Ibid, para 67.

<sup>629</sup> These are provisions whereby a state may limit rights and freedoms to the extent permitted by municipal law. Much has been written about “claw-back” clauses in the ACHPR. See particularly Ankumah, E., *The African Commission on Human and Peoples’ Rights: Practice and Procedures*. The Hague: Martinus Nijhoff, 1996; Buergenthal, T., *International Human Rights in a Nutshell*. 2<sup>nd</sup> edn. St. Paul, MN: West Group, 1995, pp. 52-3; and Flinterman, C. and C. Henderson, “The African Charter on Human and Peoples’ Rights.” In Hanski, et al (eds.), *An Introduction to the International Protection of Human Rights: A Textbook*. 2<sup>nd</sup> edn. Turku: Institute for Human Rights, Abo Akademi University, 1999, pp. 390-91.

<sup>630</sup> Olowu, op. cit, p. 19.

In terms of obligations imposed on states parties, Article 1 of the ACHPR establishes the fundamental obligation of states to ‘recognise the rights, duties and freedoms enshrined in this Charter and ... undertake to adopt legislative or other measures to give effect to them.’ This obligation is reinforced by corollary provisions of Article 62, which oblige states parties to submit biennial reports ‘on the legislative or other measures’ they have put in place in order to give effect to the ACHPR. To fulfill this obligation, states parties are obliged, in terms of Article 25, to ‘promote and ensure through teaching, education and publication, the respect of the rights and freedoms’ in the ACHPR. In addition, Article 26 obliges states parties ‘to guarantee the independence of courts<sup>631</sup> and ... allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms’ in the ACHPR.

**(b) Human Rights Implementation in Africa: The Role of the Human Rights Commission**

The ACHPR’s principal implementation mechanism is available through the AComHPR, which is established under Article 30 with the tripartite mandate to promote, to ensure and to interpret the human and peoples’ rights in the ACHPR.<sup>632</sup> Established in 1987, the AComHPR is comprised of 11 members acting in their

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<sup>631</sup> In *Media Rights Agenda and Constitutional Rights Project v Nigeria* the AComHPR held that: ‘A government that governs truly in the best interest of the people ... should have no fear of an independent judiciary. The judiciary and the executive branch of government should be partners in the good ordering of society. For governments to oust the jurisdiction of the courts on a broad scale reflects a lack of confidence in the justiciability of its own actions, and a lack of confidence in the courts to act in accordance with the public interest and rule of law.’ Ibid, para. 81.

<sup>632</sup> Article 45(1) – (3) of the ACHPR.

individual and personal capacities.<sup>633</sup> These members are elected by the Assembly of Heads of State and Government<sup>634</sup> to serve for a period of six years and may stand for re-election (Article 36). For the past two decades of its existence, the Commission has been ‘the quasi-judicial body of the African Charter [on Human and Peoples’ Rights], responsible for implementing and enforcing the rights provisions in the African Charter.’<sup>635</sup>

Headquartered in Banjul, The Gambia, the Commission discharges its mandate in a tripartite arrangement through examining state reports under the state reporting procedure. The Commission also examines complaints from states and individuals under the complaints procedure; and it also undertake promotional activities. Viewed in this context,

The state reporting procedure enables the Commission to examine measures a state party has put in place to secure the provisions of the ACHPR. The complaints procedure permits the consideration of both inter-state complaints (Articles 47-54) as well as individual complaints (Articles 55-6). ... The Commission’s promotional mandate enables it to ‘undertake studies and researches on Africa’s problems in the field of human and peoples’ rights’ and to pursue educative programmes; to formulate normative human rights standards and to embark on co-operative programmes that would enhance human rights protection in Africa (Article 45).<sup>636</sup>

However, over time, the fulfilment of the mandate of the Commission has been imperilled by the lack of timely or sheer failure of state reporting by many states in Africa.<sup>637</sup> Besides, even when states do submit reports, ‘they frequently fail to send

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<sup>633</sup> Ibid, Article 31.

<sup>634</sup> Ibid, Article 33.

<sup>635</sup> Du Plessis, op. cit, p. 529.

<sup>636</sup> Olowu, op. cit, p. 19.

<sup>637</sup> For an updated status of state reporting, visit “Status of Submission of State Periodic Reports to the African Commission on Human and Peoples’ Rights as of 31<sup>st</sup> December 2010. Available at <[http://www.achpr.org/state\\_periodic\\_reports.doc](http://www.achpr.org/state_periodic_reports.doc)> (assessed 31 March 2012).

competent representatives to present them.<sup>638</sup> This leads to long delays, and some reports have become very [out]dated by the time they are examined.<sup>639</sup>

In order to minimise the impact of this problem, the Commission later adopted a radical approach to this. At its 23<sup>rd</sup> Session in 1998 it decided that it ‘would henceforth consider states’ reports without the presence of representatives once affected states had been given adequate opportunity to attend and had failed to respond.’<sup>640</sup> It also decided to issue “Concluding Observations” in conformity with UN human rights treaty bodies.

Other impediments of the Commission in its state reporting mandate is the lack of effective follow-up mechanisms, in that the Commission does not have the mandate or mechanism to make follow up on the implementation of its recommendations.<sup>641</sup> This weakness has been criticised as lacking ‘seriousness [and] incisiveness’ and as constituting ‘a reduction of the whole exercise [of examining states’ periodic reports] into a rigmarole.’<sup>642</sup> Parallel to this impediment is the problem of disregard of the decisions of the Commission by the concerned African states. For instance, the Commission reported at a joint meeting with African Human Rights Court held in June 2006, that by then ‘only in about one or two cases had the Commission’s report

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<sup>638</sup> Viljoen, F., “Overview of the African Regional Human Rights System.” In Heyns, C. (ed.), *Human Rights in Africa*. The Hague: Kluwer Law International, 1998, pp. 128-205, p. 189.

<sup>639</sup> Olowu, op. cit.

<sup>640</sup> Ibid.

<sup>641</sup> Du Plessis, op. cit, p. 529; and Nmehielle, V.O.O., *The African Human Rights System, its Laws, Practices and Institutions*. 2001, p. 246.

<sup>642</sup> Quashigah, K., “The African Charter on Human and Peoples’ Rights: Towards a More Effective Reporting Mechanism.” *African Human Rights Law Journal*. Vol. 2 No. 2, 2002, pp. 261-300, p. 278.

been formally recognised and responded to.’<sup>643</sup> As Kanyeihamba (one of the pioneer judges of the African Human Rights Court) points out: ‘In respect of the overwhelming majority of the Commission’s reports, the response from those it had addressed them was a conspicuous silence.’<sup>644</sup>

This problem is compounded by the fact that the decisions of the Commission are not binding, compelling the Commission to seek ‘amicable resolution and, should that fail, makes non-binding recommendations which the Assembly of Heads of State and Government should adopt.’<sup>645</sup> As it can be rightly observed, in Africa: ‘It becomes apparent that those states which have perpetrated human rights violations have the power to lobby like-minded states to potentially veto the adoption of these recommendations, hence our particular criticism that human rights in Africa are at the behest of states.’<sup>646</sup>

So, given this kind of diplomacy and political good-will amongst African states, human rights protection within the African regional human rights system has been compromised in most cases.

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<sup>643</sup> Kanyeihamba, G.W. “Assessing Regional Approaches to the Protection of Human Rights: The Case of the Still Born African Court on Human and Peoples’ Rights.” *East African Journal of Peace and Human Rights*. Vo. 15 No. 2, 2009, pp. 278-295, p. 282.

<sup>644</sup> Ibid.

<sup>645</sup> Du Plessis, op. cit, p. 529. See also Viljoen, F. and L. Louw, “The Status of the Findings of the African Commission: From Moral Persuasion to Legal Obligation.” *Journal of African Law*. Vol. 1. 2004, pp. 9-10.

<sup>646</sup> Du Plessis, ibid.

To the contrary, the individual complaints procedure of the Commission ‘has been kept remarkably active.’<sup>647</sup> This is evidenced by the number of cases it has examined and the decisions coming from this process. However, this procedure is constrained by a sheer imbalance decisions taken by the Commission, which tend to favour civil and political rights at the expense of socio-economic rights.<sup>648</sup> This is manifested in its decisions in *Malawi African Association, Amnesty International v Mauritania*<sup>649</sup> and *Free Legal Assistance Group and 3 Others v Zaire*.<sup>650</sup> In these cases, the Commission granted effective remedies to violations of civil and political rights more than it did to socio-economic rights, ‘losing one of numerous opportunities it had to elaborate on the content of economic, social and cultural rights as well as to chart the path of granting appropriate remedies and relief for established violations.’<sup>651</sup>

Although the Commission has been praised by many scholars<sup>652</sup> on its decision in *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria* (known famously as the *SERAC case*),<sup>653</sup> Olowu criticises it for ‘uncritically adopting the “progressive realisation” paradigm adopted by the CESC

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<sup>647</sup> Olowu, op. cit, p. 20.

<sup>648</sup> Olowu, D., “Emerging Jurisprudence on Economic, Social and Cultural Rights in Africa: A Critique of the Decision of *SERAC and Another v Nigeria*.” *Turf Law Review*. Vol. 2 No. 1, 2005, p. 29-44.

<sup>649</sup> (2000) AHRLR 149 (ACHPR 2000).

<sup>650</sup> Communication No’s 25/89; 47/90; 56/91; and 100/93, Ninth Annual Activity Report: 1995-1996.

<sup>651</sup> Olowu, op. cit, p. 20.

<sup>652</sup> See, for instance, Bekker, G., “The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria.” *Journal of African Law*. Vol. 47, 2003; Coomans, F., “The Ogoni Case Before the African Commission on Human and Peoples’ Rights.” *International and Comparative Law Quarterly*. Vol. 52 No. 3, 2003, pp. 749-60; and Shelton, D., “Decision Regarding Communication 155/96 *SERAC v Nigeria*. Case No. ACHPR/COMM/A044/1.” *American Journal of International Law*. Vol. 96, 2002, pp. 937-42.

<sup>653</sup> (2001) AHRLR 60 (ACHPR 2001).



[the Committee on Economic, Social and Cultural Rights], which ... has no legal or factual basis in the ACHPR.’<sup>654</sup> According to Olowu, the decision ‘is bereft of any substantial remedy for the established violations, which may explain why there has been no tangible outcome from the decision in the troubled Niger-Delta region, long after its delivery.’<sup>655</sup>

The inter-state communication mechanism under the ACHPR, which was designed to enable African states to play a watchdog role, has remained dormant all over this time. In this respect, the Commission has received only reports filed by DRC against Burundi, Rwanda and Uganda;<sup>656</sup> and by Ethiopia against Eritrea,<sup>657</sup> both alleging violations of the ACHPR provisions.

**(c) Strengthening the Human Rights Implementation in Africa: The Establishment of the Human Rights Court**

The overt challenges facing the African Human Rights Commission attracted a number of criticism and many critics recommended for the establishment of an effective African human rights court dedicated to human rights.<sup>658</sup> In order to address some of these major challenges in making the ACHPR more effectively and widely implemented and given legal force across and around Africa, the OAU decided to establish an African Human rights court. The decision to establish the

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<sup>654</sup> Olowu, op. cit, pp. 20-21; and Olowu (2004), op. Cit, pp. 197-8.

<sup>655</sup> Olowu, ibid, p. 21. See also Olowu (2005), op. cit.

<sup>656</sup> *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, Communication No. 22 of 1999.

<sup>657</sup> *Ethiopia v Eritrea*, Communication No. 233 of 1999.

<sup>658</sup> See, for instance, Adjetey, F.N., “Religious and Cultural Rights: Reclaiming the African Woman’s Individuality: The Struggle between Women’s Reproductive Autonomy and African Society and Culture.” *American University Law Review*. Vol. 44, 1995, p. 1375.

African Court on Human and Peoples' Rights was taken during the summit of Heads of State and Government of the OAU, held in Tunis, Tunisia, in June 1994.

In particular, the summit requested the Secretary-General of the OAU 'to convene a meeting of government experts to ponder, in conjunction with the African Commission, over the means to enhance the efficiency of the African Commission and to consider in particular, the establishment of an African Court on Human and Peoples' Rights.'<sup>659</sup> This idea came to fruition in 1998 when the OAU Assembly of Heads of State and Government 'finally adopted the Protocol establishing an African Court on Human and Peoples' Rights.'<sup>660</sup> As indicated by many scholars, 'it is the lack of an effective enforcement mechanism under the African Human Rights Charter that necessitated the adoption of the Protocol on the African Human Rights Court.'<sup>661</sup>

However, this Protocol 'never effectuated an actual functioning court.'<sup>662</sup> The Court materialised when the OAU, which was widely regarded as an ineffective regional body,<sup>663</sup> was replaced by the AU in 2002. The AU was more pro-active in establishing the Court, whereby in 2004 the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (the African Human Rights Court Protocol) was adopted. The

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<sup>659</sup> Kanyeihamba, op. cit, pp. 289-90.

<sup>660</sup> Akinseye-George, op. cit, p. 170.

<sup>661</sup> Nmeihelle, V.O., "Development of the African Human Rights System in the Last Decade." *Human Rights Brief*. Vol. 6 No. 11, 2004.

<sup>662</sup> Bowman, op. cit, p. 426.

<sup>663</sup> Ibid.

Protocol, which entered into force on 25<sup>th</sup> January 2004, expressly states that the African Human Rights Court shall ‘complement the protective mandate of the African Commission on Human and Peoples’ Rights ...’<sup>664</sup> Viewed in this context, the African regional human rights court is now composed of two reinforcing bodies: the Commission, which is a quasi-judicial human rights institution<sup>665</sup> and the African Human Rights Court, which is the ‘main judicial institution.’<sup>666</sup> Both in theory and expectation, these ‘two bodies create an operable judicial system for Africa.’<sup>667</sup>

The first ever judges of the Court were elected upon a directive of the summit of Heads of State and Government of the AU held in Banjul, The Gambia, in June 2006 and were sworn on 2<sup>nd</sup> July 2006 in the same city before all Heads of State and Government.<sup>668</sup> As many African scholars are enthusiastic about the prospects of the African Human Rights Court,<sup>669</sup> one can only view it as a more effective mechanism to boost the image of the Commission, at least by looking at the Court’s mandate and

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<sup>664</sup> Article 11 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights. The import and effectiveness (or lack of it) of the principle of complementarity between the African Commission and the ACHPR is critically elucidated in Ebobrah, S.T., “Towards a Positive Application of Complementarity in the African Human rights System: Issues of Functions and Relations.” *The European Journal of International Law*, Vol. 22 No. 3, 2011, pp. 663-688.

<sup>665</sup> *Jawara v The Gambia* (2000) AHRLR 107 (ACHPR 2000).

<sup>666</sup> Viljoen, F., “A Human Rights Court for Africa, and Africans.” *Brooklyn Journal of International Law*. Vol. 1, 2004; and Bowman, op. cit, p. 427.

<sup>667</sup> Bowman, *ibid*.

<sup>668</sup> Kanyeihamba, op. it, p. 291.

<sup>669</sup> See particularly Nmehielle, V.O.O., “Towards an African Court on Human Rights: Structuring of the Court.” *Annual Survey of International and Comparative Law*. Vol. 6, 2000, pp. 27-50; Eno, R.W., “The Jurisdiction of the African Court on Human and Peoples’ Rights.” *African Human Rights Law Journal*. Vol. 2 No. 2, 2002, pp. 223-33; Naldi, G.J. and K. Magliveras, “Reinforcing the African System of Human Rights: The Protocol on the Establishment of a Regional Court of Human Rights.” *Netherlands Quarterly of Human Rights*. Vol. 16 No. 4, 1998, pp. 431-56; Udobana, N.J., “Towards the African Court on Human and Peoples’ Rights: Better Later than Never.” *Review of African Commission on Human and Peoples’ Rights*. Vol. 8 No. 2, 1999, pp. 338-58; Udobana, N.J., “A Harmony or Cacophony? The Music of Integration in the African Union Treaty and the New Partnership for Africa’s Development”, op. cit; and Viljoen, F., “A Human Rights Court for Africa, and Africans”, op. cit.

the mechanism put in place for enforcement of its judgments. The Court has a mandate to render advisory opinions on any legal matters pertaining to the ACHPR or any other relevant human rights instrument. In so doing, the court has jurisdiction on the interpretation of its own jurisdiction,<sup>670</sup> whereby its judgments are final and are not subject to appeal.<sup>671</sup> As an independent organ of the AU, the decisions and orders of the African Human Rights Court are binding.<sup>672</sup> In principle, the implementation of the judgments of the Court is monitored by the Council of Ministers of the AU on behalf of the Assembly,<sup>673</sup> which serves as the Executive Council of the AU and ‘prepares decisions on strategic areas of focus for the Assembly’<sup>674</sup> of Heads of State and Government. As Du Plessis submits, under the Court’s set up, non-compliance with the judgment or order of the Court ‘may have resulted in an AU decision, which in turn may have led to the imposition of sanctions as envisaged under the AU Constitutive Act.’<sup>675</sup>

The Court, under Article 5(3) of the African Human Rights Court Protocol, ‘may recognise relevant NGOs with observer status before the Commission, and individuals to institute cases directly before it, in accordance with article 34(6) of this Protocol.’ In terms of Article 34(6) of the Protocol,

At the time of the ratification of this Protocol or any time thereafter, the State shall make a declaration accepting the competence of the court to receive cases under article 5(3) of this Protocol. The court shall not receive any petition under article 5(3) involving a state party which has not made such a declaration.

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<sup>670</sup> Article 3 of the Protocol.

<sup>671</sup> Ibid, Article 28.

<sup>672</sup> Kanyeihamba, op. cit, p. 27.

<sup>673</sup> Article 3 of the Protocol, Article 29(2).

<sup>674</sup> Kanyeihamba, op. cit.

<sup>675</sup> Du Plessis, op. cit, p. 537.

Interpreting the two foregoing Articles in *Michelot Yogogombaye v Senegal*<sup>676</sup> the AfCHPR held that the combined effect of these provisions is that ‘direct access to the Court by an individual is subject to the deposit by the respondent State of a special declaration authorizing such a case to be brought before the Court.’<sup>677</sup> In this case the AfCHPR found Senegal to have not accepted the jurisdiction of the Court to hear cases instituted directly against the country by individuals or non-governmental organisations. In such circumstances, the Court held that: ‘pursuant to Article 34(6) of the Protocol, it does not have jurisdiction to hear the application.’<sup>678</sup> A similar line of holding was made by the Court in its recent decisions in *Amir Adam Timan v The Republic of The Sudan*<sup>679</sup> and *Femi Falana v African Union*<sup>680</sup>. In the latter case, the applicant argued that Article 34(6) of the Protocol was inconsistent with Articles 1, 2, 7, 13, 26 and 66 of the African Charter on Human and Peoples’ Rights. The applicant contended that the requirement for a State to make a declaration to allow access to the Court by individuals and NGOs was a violation of his rights to freedom from discrimination, fair hearing and equal treatment as well as his right to be heard. The applicant alleged to have made several attempts to get the Federal Republic of Nigeria to deposit the declaration under Article 34(6) of the Protocol, to no avail. Furthermore, the applicant argued that his reason to file the application against the respondent was because it was the representative of the 54 member states of the

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<sup>676</sup> Application No. 001/2008 (AfCHPR).

<sup>677</sup> Ibid, para 34.

<sup>678</sup> Ibid, para 37.

<sup>679</sup> Application No. 005/2012 (AfCHPR) (noting that, as per the correspondence from the AU Legal Counsel, the Republic of The Sudan has not made the declaration envisaged under Article 34(6) of the Protocol; and, consequently, the Court manifestly lacked jurisdiction to receive the application submitted by the Applicant against the Respondent State. Paras 8-9).

<sup>680</sup> Application No. 001/2011 (AfCHPR). Judgment in this matter was delivered on 26<sup>th</sup> June 2012. The application was publicly heard on 22<sup>nd</sup> and 23<sup>rd</sup> March, 2012. This researcher attended the two-day hearing, which was held at the Court’s headquarters in Arusha, Tanzania.

African Union, thus, capable of being sued, as a corporate community, for and on behalf of its constituent members.

Striking the application out, the Court held that it lacked jurisdiction to entertain this application because the respondent, the AU, is not a member to the Protocol; and, as such, it cannot be sued on behalf of its member states. In the main, the Court held that:

73. At this juncture, it is appropriate to emphasize that the Court is a creature of the Protocol and that its jurisdiction is clearly prescribed by the Protocol. When an application is filed before the Court by an individual, the jurisdiction of the Court *ratione personae* is determined by Articles 5(3) and 34(6) of the Protocol, read together, which require that such an application will not be received unless it is filed against a State which has ratified the Protocol and made the declaration. The present case in which the Application has been filed against an entity other than a State having ratified the Protocol and made the declaration falls outside the jurisdiction of the Court.

Therefore, the Court held to have no jurisdiction to entertain the Application.

Although the involvement of NGOs and individuals in instituting cases at the Court is seen in some quarters as a particularly innovative element,<sup>681</sup> the Court's Protocol has failed to make unequivocal provision granting *locus standi* to these important stakeholders in the promotion and protection of human rights in Africa.<sup>682</sup> The declaration expected to be made by States when ratifying the Protocol in Articles 5(3) and 34(6) mentioned above have been unreasonably withheld by most African States<sup>683</sup>; thus, narrowing the involvement of most civil society organisations.<sup>684</sup>

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<sup>681</sup> Olowu, *op. cit.*, p. 25.

<sup>682</sup> Naldi and Magliveras, *op. cit.*; Udombana, *op. cit.*; Nmehielle, *op. cit.*; Eno, 2002, *op. cit.*; Hopkins, *op. cit.*; and Viljoen, *op. cit.*

<sup>683</sup> For instance, Tanzania has accepted the Court's competence provided only that 'all domestic remedies have been exhausted and in adherence to the Constitution.' See the AfCHPR's website: <http://www.africa-court.org/en/> (accessed 18 June 2012).

<sup>684</sup> As of 22 January 2013, only six African countries – Burkina Faso, Ghana, Malawi, Mali, Rwanda and Tanzania – have made declarations in terms of Article of the Protocol granting *locus standi* to

However, this could be remedied by the CSOs or individuals submitting their cases to the Commission, which may then refer them to the Court.<sup>685</sup> This point is founded in the fact that during the drafting of the Protocol ‘many states objected or made it clear that non-governmental organisations or individuals would not have direct access to the court except with their permission.’<sup>686</sup>

In determining cases, the Court should apply the Constitutive Act of the AU, international treaties (whether general or particular) ratified by the concerned states, international custom as evidence of general practice and accepted law. The Court may also apply general principles of law recognised universally or by African states, judicial decisions and writings of the most highly qualified publicists of various nations as well as the regulations, directives and decisions of the AU, ‘as subsidiary means for the determination of the rules of law, and any other law relevant to the determination of the case.’<sup>687</sup> In deciding cases before it, the Court has also to bear in mind the complementarity between it and the African Commission on Human and Peoples’ Rights<sup>688</sup>, which may include drawing inspiration from the latter’s jurisprudence.<sup>689</sup> Litigants before the Court also have the right ‘to be assisted by legal counsel and/or any other person of the party’s choice’.<sup>690</sup>

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NGOs to access the Court. Rwanda signed its Declaration on 2013 January 2013, which was later duly deposited with the AU.

<sup>685</sup> See particularly, Juma, D., “Access to the African Court on Human and Peoples’ Rights: A Case of the Poacher Turned Gamekeeper?” *Essex Human Rights Review*, Vol. 4 No. 1, 2007.

<sup>686</sup> Kanyeihamba, op. cit, p. 290.

<sup>687</sup> Ibid, p. 291. See particularly AU/XC/AD/27/50, Addis Ababa.

<sup>688</sup> See particularly Articles 2 and 8 of the Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of an African Court on Human and Peoples’ Rights.

<sup>689</sup> See particularly Ebobrah, S.T., “Towards a Positive Application of Complementarity in the African Human Rights System: Issues of Functions and Relations.” *The European Journal of International Law*. Vol. 22 No. 3, 2011, pp. 663-688, at p. 671.

<sup>690</sup> See particularly Rule 28 of the Rules of the African Court on Human and Peoples’ Rights (2010).

**(d) Merging the Human Rights Court and the Court of Justice: Whistling in the Wind?**

Even before the Court could start functioning and deliver to the intended expectations, a decision was taken to conjoin it with the African Union Court of Justice (ACJ), ‘so as the two stand together as a composite Court – the African Court of Justice and Human Rights.’<sup>691</sup> This decision was contrary to the original intension of the AU, which wanted to have two separate judicial institutions – the African Court on Human and Peoples’ Rights and the ACJ. Originally,

The ACJ was intended to be the principal judicial organ of the AU with its primary role being the authoritative interpretation, application and implementation of the Constitutive Act of the AU and the various Protocols. Its mandate also included the adjudication of contentious matters between state parties to the Constitutive Act on any issues referred to it by mutual agreement between states. The ACJ was not originally conceived to have competency to interpret the African Charter [on Human and Peoples’ Rights], although cognisance could be taken of the Charter. The African Court, by contrast, would focus on violations of the African Charter and would be the principal arm by which the Charter would be enforced.<sup>692</sup>

Nonetheless, upon a suggestion by the then Nigerian president, Olusegun Obasanjo, who was then the Chairperson of the Assembly of the AU, made in July 2004, the AU agreed to merge the two courts on ground, *inter alia*, that there was a growing number of institutions at the AU, making the AU unable to support them financially and in terms of human resources.<sup>693</sup> As a result, the AU Commission was requested to work out the modalities on the implementation of this decision, culminating in the set up of a panel of legal experts who met in Addis Ababa, Ethiopia, on 13-14 January 2005 to chart out and recommend on the way forward. The report of the

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<sup>691</sup> Du Plessis, op. cit, p. 538.

<sup>692</sup> Ibid, p. 538.

<sup>693</sup> See Coalition for an Effective African Court on Human and Peoples’ Rights, “About the African Court.” Available at [http://www.africancourtcoalition.org/editorial.asp?page\\_id=16](http://www.africancourtcoalition.org/editorial.asp?page_id=16) (accessed 28 July 2011). See also Interights, “African Union Adopts the Protocol on the Statute of the African Court of Justice and Human Rights.” Available at <http://www.interights.org/AfricanSingleProtocolAdopted/index.htm> (accessed 15 August 2011).



meeting was submitted by the AU Commission to the Executive Council of the AU at the summit in Abuja, Nigeria, in January 2005.<sup>694</sup> In this respect,

The AU Commission recommended that the [merger] of the jurisdiction of the two courts should be retained while at the same time making it possible to administer the protocols [establishing two courts] through the same court by way of special chambers, and the necessary amendments to both protocols be effected through the adoption of a new protocol by the AU Assembly of Heads of State and Government.<sup>695</sup>

Further consultations between the AU organs (i.e. the Executive Council, the Permanent Representatives Committee [composed of ambassadors to the AU in Addis Ababa] and the AU Commission) and government legal experts from member states took place between January 2005 up until at the July 2008 AU summit when Justice Ministers formally adopted a ‘single legal instrument [“the Single Court Protocol”] to create an African Court of Justice and Human Rights.’<sup>696</sup> Under Article 1, the Single Court Protocol replaces the two protocols that established the two courts.<sup>697</sup> As a result of the adoption of the Single Court Protocol, the Protocol on the Establishment of the African Court on Human and Peoples’ Rights would remain in force, in terms of Article 7 of the Single Court Protocol, for a transitional period of one year to enable the African Human Rights Court ‘to take necessary measures for the transfer of its prerogatives, assets, rights, and obligations to the African Court of Justice and Human Rights.’

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<sup>694</sup> See “Draft Protocol on the Integration of the African Court on Human and Peoples’ Rights and the Court of Justice of the AU.”

<sup>695</sup> Coalition for an Effective African Court on Human and Peoples’ Rights, “About the African Court”, op. cit.

<sup>696</sup> See Protocol on the Statute of the African Court of Justice and Human Rights. Available at <http://www.interights.org/AfricanSingleProtocolAdopted/index.htm> (accessed 28 July 2011).

<sup>697</sup> The Protocol to the African Charter on Human and Peoples’ Rights on the Establishment of African Court on Human and Peoples’ Rights, was adopted by the AU Assembly of Heads of State and Government in Ouagadougou, Burkina Faso, on 10<sup>th</sup> June 1998; and the Protocol of the Court of Justice of the African Union, was adopted by the same body in Maputo, Mozambique, on 11<sup>th</sup> July 2003.

The effect of this decision is that ‘the African Court on Human and Peoples’ rights will be subsumed into the African Union Court of Justice, hence the name “African Court of Justice and Human Rights.”’<sup>698</sup> This decision, however, has been termed ‘highly controversial.’<sup>699</sup> As Sceats contends, amongst the first institutions ‘to voice concern was the [African] Commission [on Human and Peoples’ Rights], which warned that the two courts had ‘essentially different mandates and litigants’ and that the decision could have “a negative impact on the establishment of an effective African Court on Human and Peoples’ Rights.”’<sup>700</sup>

In addressing this challenge facing the merger of the two courts, the new court has been divided into two sections: a general section dealing with disputes over matters such as powers of the AU and breaches of states’ treaty obligations; and a human rights section to deal with cases of violations of human rights. Under this arrangement, every section shall be composed of eight judges.<sup>701</sup>

As Du Plessis earnestly argues, the decision to merge the two courts raises several legal issues. One of those issues is the question of the binding nature of the two sets of protocols. While Article 7 of the Single Court Protocol requires that the Human Rights Court Protocol should remain in force for a prescribe period of one year, the

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<sup>698</sup> Du Plessis, *op. cit.*, p. 538.

<sup>699</sup> Sceats, S., “Africa’s New Human Rights Court: Whistling in the Wind?” available at <http://www.abbymedia.com/news/?p=2372> (accessed 1 August 2011).

<sup>700</sup> Ibid. Quoting African Commission on Human and Peoples’ Rights, Res. 76(XXXVII)05: “Resolution on the Establishment of an Effective Court on Human and Peoples’ Rights.” Adopted in Banjul, The Gambia, on 11<sup>th</sup> May 2005. *See also* Du Plessis, *op. cit.*, pp. 5390-40.

<sup>701</sup> Article 16 of the Single Court Protocol.

amending Single Court Protocol will come into force thirty (30) days after it receives fifteen (15) ratifications.<sup>702</sup> In the words of Du Plessis,

The decision to merge the courts brings into focus the legality of amendments to the two instruments establishing the Courts. Regard is to be had to article 40(2) of the Vienna Convention on the Law of Treaties, which provides that any amending agreement does not bind any state already a party to the treaty which does not become a party to the amending agreement. The result would be the anomalous situation whereby state parties are party to differing treaties on the same subject, giving rise to legal uncertainty and insurmountable problems with respect to enforcement.<sup>703</sup>

Another critical issue regarding this merger relates to the lack of clear elaboration on the principle of complementarity between the new merged Court and the AComHPR. Although the AComHPR is one of the key entities eligible to submit cases to the Court,<sup>704</sup> its role as a complementary human rights organ in Africa has been neglected. To the contrary, Article 2 of the Human Rights Court Protocol provides for a system of complementarity between the AComHPR and the African Court on Human and Peoples' Rights, 'which has generally been interpreted to mean that the Court would complement and reinforce the Commission.'<sup>705</sup> This anomaly may, however, be atoned by amending the Rules of Procedure of the AComHPR to bring them in conformity with the Rules of Procedure of the merged Court.<sup>706</sup>

As many critics have observed, although the merger of the two courts was justified on minimising resources at the AU Commission, the delay in finalising this process and making the merged court functional, has in effect 'simply prolonged the wait for

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<sup>702</sup> Ibid. Article 9.

<sup>703</sup> Du Plessis, op. cit, p. 539.

<sup>704</sup> Article 30(b) of the Statute of the African Court of Justice and Human Rights (the African Court Statute).

<sup>705</sup> Du Plessis, op. cit, p. 541.

<sup>706</sup> Ibid, pp. 541-2.

an African Court dedicated to human rights.’<sup>707</sup> It is historically regrettable that the idea and dream to have an effective African Court on Human Rights was mooted in 1961 at a conference of African jurists in Lagos, Nigeria. At this conference it was decreed that Africa needed a human rights charter with an effective court to ensure that human rights and basic fundamental principles are effectively realised. As set forth in the Preamble to “The International Commission of Jurists, African Conference on Rule of Law: A Report of the Proceedings of the Convention,”

In order to give full effect to the Universal Declaration of Human Rights of 1948, this conference invites the African Governments to study the possibility of adopting an African Convention of Human Rights in such manner that the conclusions of this conference *will be safeguarded by the creation of a court of appropriate jurisdiction and that recourse thereto be made available for all persons under the jurisdiction of the signatory states.*<sup>708</sup> [Emphasis added.]

Ever since the OAU decided to have a human rights court in 1998, slow pace has been made to ensure that the court is operational. Even after the court was made operational in 2006, the court has determined no significant cases<sup>709</sup>, with a number of the pioneer judges having finished their tenure. This justifies the argument often advanced by many scholars on African human rights to the effect that African states are adamant to making human rights realisable in their jurisdictions. For instance, Du Plessis is of the view that, it is trite that human rights protection ‘is routinely viewed as being at the behest of states on the African continent. This is more obvious from

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<sup>707</sup> Ibid, p. 542. See also Sceats, op. cit.

<sup>708</sup> Available at [http://www.africancourtcoalition.org/editorial.asp?page\\_id=16](http://www.africancourtcoalition.org/editorial.asp?page_id=16) (accessed 28 December 2011).

<sup>709</sup> However, the first case to be finally heard by the Court (*Femi Falana v African Union*, Application No. 001/2011) was publicly heard on 22<sup>nd</sup> and 23<sup>rd</sup> March 2012. This researcher attended this public hearing on an official invitation (as a member of the ACERCW) by the Court and he has notes of the hearing on file.

the failure of states responsible for human rights violations to implement the recommendations of the African Commission [on Human and Peoples' Rights].<sup>710</sup>

In the view of Justice Kanyeihamba, one of the first pioneer judges of the African Human Rights Court,

Since taking the oath of office in 2006, the judges of the African Court [had] not discovered any encouraging signs that they [would] be treated differently from the Human Rights Commission. Indeed, their situation appears to be much worse than that of the commissioners. The Commission's advisory opinions can and have been ignored with impunity. The African Court's envisaged jurisdiction would mean the delivery of binding judgments and orders that could adversely affect Member States and for this reason, its role as seen and expected by its legal fraternity, its judges, and indeed, the world at large, *is resented and opposed by many states of the African Union, even though outwardly they express lukewarm support.*<sup>711</sup> [Emphasis supplied.]

This attitude by African leaders and politicians will risk the human rights section of the merged court to being regarded as of "second class" to its counterpart: the general section. This is because of the historical fact that in the AU set-up and decision machineries, human rights issues have been perceived as less significant 'than the border disputes and other matters of "high state" [concern] which are likely to occupy the general section.'<sup>712</sup> Going by the experience of the pioneer judges of the Human Rights Court, the AU organs have been regarding the human rights bodies of the AU as subordinate to them; thus, receiving low status, which compromises their effectiveness.<sup>713</sup>

Leaving this pessimism apart, the key task of the human rights section of the merged Court 'is to hear cases brought against African states for failure to respect human

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<sup>710</sup> Du Plessis, op. cit, p. 541.

<sup>711</sup> Kanyeihamba, op. cit, p. 282.

<sup>712</sup> Sceats, op. cit.

<sup>713</sup> Kanyeihamba, op. cit, p 281.

rights.’<sup>714</sup> The judgments and orders of the court shall be binding; whereby, in terms of Article 43(6) of the Merged Court’s Statute, the Executive Council of the AU is charged with the monitoring mandate of these judgments. In terms of Article 45, the Court may, ‘if it considers that there was a violation of a human or peoples’ right, order any appropriate measures in order to remedy the situation, including granting fair compensation.’ In addition, the court may also, by virtue of the provisions of Article 55 of the its Statute, issue advisory opinions ‘in open court, notice having been given to the Chairperson of the [African Union] Commission and Member States, and other International Organisations directly concerned.’

One of the problematic procedural matters pertaining to the proceedings of the court is failure to grant direct access to individuals victims of human rights abuses and NGOs. It is very saddening that at the very late stage of negotiations for the merger Protocol ‘African states voted to deny automatic standing to individual victims of human rights abuses and NGOs.’<sup>715</sup> As is the case with the African Human Rights Court’s Protocol, although Article 30(f) of the Statute of the African Court allows individuals and NGOs accredited to the AU or its organs to submit cases to the court, Article 8(3) of the Single Court Protocol [in a more or less similar tone as to Article 34(6) of the Human Rights Court’s Protocol], provides that,

8.3. Any Member State may, at the time of signature or when depositing its instrument of ratification or accession, or at any time thereafter, *make a declaration accepting the competence of the Court to receive cases under Article 30(f) involving a State which has not made such a declaration.* [Emphasis supplied]

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<sup>714</sup> Sceats, op. cit.

<sup>715</sup> Ibid.

This rule is prohibitive of individuals and NGOs from accessing the merged Court in two respects: first, individual victims of human rights abuses and NGOs can only have *locus standi* if the state from which they are nationals or operate has made a declaration to the effect that they may bring cases to the Court. This aspect – which was orchestrated by Egypt and Tunisia<sup>716</sup> – is prohibitive to NGOs and individuals victims of human rights abuses to access the court. Given the high level of hatred to human rights and the NGOs spearheading respect for these rights prevalent in most African countries, few African countries are expected to make declarations allowing NGOs and individuals to submit cases to the Court.

This argument is backed up by the experience evidenced by most countries that ratified the African Human Rights Court's Protocol, which has a similar provision in Article 34(6). For instance, of the 24 states that ratified the African Human Rights Court's Protocol, only two – Mali and Burkina Faso – entered the necessary declarations allowing such access.<sup>717</sup> This means that unless states do not make such declarations, this limitation will 'render access to justice [under the merged Court] illusory for human rights victims.'<sup>718</sup>

Second, the NGOs must first be *accredited* to the AU or its organs. Experience has indicated that only few NGOs are accredited to the AU and its organs; and the process of accreditation is not so much known to most NGOs around Africa as well as the accreditation process is not that much smooth and speedy. As Sceats argues,

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<sup>716</sup> Ibid, p. 9.

<sup>717</sup> Ibid, p. 10.

<sup>718</sup> Interights, "African Union Adopts the Protocol on the Statute of the African Court of Justice and Human Rights", op. cit.

the requirement for accreditation ‘constitutes a major difference between the Court and the European Court of Human Rights, where direct access for individuals (and NGOs and other entities which can show they themselves are a “victim” of human rights abuse) is now compulsory.’<sup>719</sup> In a more liberal tone, the AComHPR has ‘long permitted NGOs to bring cases under the African Charter [on Human and Peoples’ Rights], even where they are not directly affected by the alleged violation (in other words, unlike in the European Court of Human Rights, standing is not restricted to “victims”).’<sup>720</sup>

Recognising the negative implications of this limitation, in June 2008 the Coalition for an Effective African Court of Human and Peoples’ Rights – a consortium of African NGOs – sent an open letter to the AU Assembly and Executive Council condemning the denial of direct access to individuals, in particular as ‘a step back in access to justice for all in Africa [that] dilutes the effectiveness of the continental judicial system and runs contrary to the provisions on access to justice in several international human rights instruments.’<sup>721</sup>

This apart, entities that can have direct access to the Court, in terms of Article 29, are States Parties; the Assembly of Heads of State and Government of the AU; the Pan-African Parliament; and Staff of the AU on appeal ‘in a dispute and within the limits and under the terms and conditions laid down in the Staff Rules and regulations’ of the AU. Presumably, the latter applies to matters to be submitted to the general

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<sup>719</sup> Sceats, *op. cit.*, p. 9.

<sup>720</sup> *Ibid.*, p. 10.

<sup>721</sup> Coalition for an Effective African Court of Human and Peoples’ Rights, “Open Letter to the AU Assembly of Heads of State and Government, 11<sup>th</sup> Ordinary Session, and the Executive Council of Ministers, 13<sup>th</sup> Ordinary Session.” 20<sup>th</sup> June 2008. Available at [http://www.africancourtcoalition.org.editorial.asp?page\\_id=141](http://www.africancourtcoalition.org.editorial.asp?page_id=141). (accessed 29 December 2011).



section of the merged Court. Entities that can submit cases to the Court under Article 30 include the African Commission on Human and Peoples' Rights; the Committee of Experts on the Rights and Welfare of the Child; and African Intergovernmental Organisations accredited to the AU or its organs.

In as much as the Court is yet to start working, as its founding Protocol has not entered into force, only expectations can be expressed at this stage. However, the merged Court is very significant in furthering the cause of human rights in Africa. When the Court becomes operational, it will expectedly make a reality the dream that has haunted Africa for an effective African Human Rights Court since the Lagos 1961 Conference of Jurists. However, given all the obvious concerns raised in this analysis facing the merged Court, the future of this court will 'certainly depend on the quality of the case law [it is going to] generate.'<sup>722</sup> Nonetheless, in terms of its working relationship with the African peoples, the Court's limited access by individuals victims of human rights abuses and NGOs may render the Court distant from the lives of the African peoples; thus, reducing its credibility before the very people it is intended to serve. This will, therefore, require rethinking the need to remove the above limitation. It is also expected that States Parties found in violation of human rights by the merged Court would respect and effectively implement its decision to avoid rendering it obsolete as has been the case with the AComHPR.

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<sup>722</sup> Sceats, *op. cit.*, p. 12.

#### **4.4.2 The African Charter on the Rights and Welfare of the Child**

The African Charter on the Rights and Welfare of the Child (ACRWC) is the first and only single regional human rights treaty to specifically protect and promote the rights and welfare of the child in the world.<sup>723</sup> It was adopted in 1990 by the Organisation of African Unity (OAU) to provide for a specific and comprehensive mechanism for the protection and promotion of children's rights and welfare at the African regional level.

In order to fairly discuss the ACRWC, this study will discuss it from three angles: the historical framework of the Charter; its normative framework; and the procedural framework.

##### **4.4.2.1 Historical Framework of the ACRWC**

The adoption of the ACRWC was a very significant historical milestone that manifested the need for legal protection of children in Africa. It was a further step in this regard, following the promulgation of the Declaration of the Rights and Welfare of the African Child in 1979. The Declaration was adopted by the Assembly of Heads of State and Government of the OAU at its 16<sup>th</sup> Ordinary Session. Before the adoption of the ACRWC, the OAU Secretariat also had recognised and streamlined various children's rights in its programmes, including child trafficking, child labour [working in collaboration with ILO under the IPEC], and children in situations of armed conflict. African states also were committed to international children's rights in terms of both ratification and implementation of the CRC. In the drafting process

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<sup>723</sup> Lloyd, A., "The African Regional System for the Protection of Children's Rights", *op. cit.*, p. 33.

of the ACRWC, CSOs – under the auspices of the African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) – were involved and their views were considerably incorporated in the final draft of the Charter.

Amongst the widely cited reasons for adopting the ACRWC is the under-representation of African States during the preparatory work on the CRC.<sup>724</sup> Furthermore, in this preparatory work, issues peculiar to Africa were not clearly taken into account. These issues include issues of child soldiers, early marriage, female genital mutilation/excision, illiteracy, as well as the role of the family, in particular the extended family.<sup>725</sup> Therefore, when the decision to formulate a charter for African children was taken up, it took into account all these issues. To date, the ACRWC has been ratified by 46 out of the 53 AU member states.<sup>726</sup>

From the historical realities, the ACRWC ‘recognises children in Africa as direct bearers of rights and, in turn, children bear responsibilities to others.’<sup>727</sup> As Lloyd points out, this ‘may be considered a controversial addition by Western thinkers, but it reflects the underpinning of African society, and positive conclusions can be drawn from this addition, once one understands the African concept of human rights.’<sup>728</sup>

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<sup>724</sup> See, for instance, Mezmur, op. cit; Sloth-Nielsen and Mezmur, op. cit; and Lloyd, op. cit.

<sup>725</sup> Lloyd, op. cit. See also Chirwa, op. cit.

<sup>726</sup> Status as of 22<sup>nd</sup> August 2011. The ratification list is available at <http://www.acerwc.org>.

<sup>727</sup> Lloyd, *ibid*, p. 33.

<sup>728</sup> *Ibid*.

The adoption of the ACRWC means that African states have an obligation to implement two international children's rights instruments concurrently.<sup>729</sup> They, thus, implement both the CRC and the ACRWC in a complementary mode.

#### **4.4.2.2 The Normative Framework of the ACRWC**

In principle, the ACRWC adequately addresses issues relating to the rights of the child on the continent in an African context.<sup>730</sup> The African Charter reinforces the protection given to children by the CRC regarding, for example, the child's best interests principle, the participation of children in armed conflicts, marriage and children marriage promises, refugee and internally displaced children, protection against apartheid and discrimination as well as socio-economic and cultural rights. In this part, we are not going to discuss all the substantive rights that are similarly provided in the CRC (which was done in section 3.3.2 above), but only those with some degree of difference with the latter.

As already noted above, the ACRWC is more concise and clear in defining who a child is. In Article 2, it defines a child as 'every human being under 18 years.' Concerning parental responsibilities, there is a terminological difference between the two children's rights instruments. While the CRC imposes obligations on parents in the context of "child's custodians," the ACRWC extends the parental responsibilities to "other people in charge of the child". In fact, this is in appreciation of the concept

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<sup>729</sup> Mashamba, C.J., "Domestication of International Children's Norms in Tanzania." *The Justice Review*. Vol. 8 No. 2, 2009, pp. 1-17, p. 9.

<sup>730</sup> A recent work to treat this subject at some length is Sloth-Nielsen, J. (ed.), *Children's Rights in Africa: A Legal Perspective*. Hampshire: Ashgate Publishing Company, 2008.

of extended family in the African context, which misses in the CRC. Parallel to parental responsibilities, the ACRWC imposes responsibilities on the child, which include the duty to respect parents and the duty towards the society, community and the nation. In this context, it can be argued that the concept of duties answers to the idea of the child's participation in his family, community, and society inherent in Africa.

Unfortunately, the Charter does not explicitly provide for a child's right to social security, as appears in Article 26 of the CRC. In terms of criminal justice for children, the ACRWC does not have as clearer provisions as the CRC. For instance, it does not provide for the right to diversion in a comprehensive form as is the case with Articles 37 and 40 of the CRC. The ACRWC also does not strongly state anything relating to the CRC's principle that deprivation of liberty should be used as a matter of last resort and only for the shortest possible period of time; except for a provision that obliges States Parties to 'ensure that every child accused in infringing the penal law' ... 'shall have the matter determined as speedily as possible by an impartial tribunal.'<sup>731</sup> In addition, the ACRWC does not have provisions prohibiting life imprisonment without release or for challenging a detention order; nor are there provisions setting out the minimum age of criminal responsibility; and provisions making explicit reference to the requirement to established separate laws, procedures and judicial system for children. However, given the fact that the ACRWC complements the CRC, such lacuna can be filled in by resort to specific provisions in the CRC where the ACRWC lacks such provisions.

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<sup>731</sup> Article 17(2)(c)(iv) of the ACRWC.

Nonetheless, the ACRWC contain clear and unequivocal provisions that provide guarantees to children in the criminal justice systems in Africa, including fair trial guarantees – that is, every child is innocent until proven guilty<sup>732</sup>; shall be informed promptly, ‘in a language that he understands and in detail’<sup>733</sup>, of the charge(s) against him<sup>734</sup>; shall be given legal and other appropriate assistance<sup>735</sup>; and shall have their matters dealt with as speedily as possible and is entitled to appeal.<sup>736</sup> In the criminal justice system for children, the press is prohibited from attending trials<sup>737</sup> to ensure that the child’s rights to privacy and dignity are guaranteed.<sup>738</sup>

#### 4.4.2.3 Obligations of States

The ACRWC contains ‘a comprehensive, inclusive and progressive provision for the general obligations and responsibilities of state parties.’<sup>739</sup> The obligations imposed on states parties to the ACRWC include taking necessary measures to implement provisions and principles in the Charter. The “measures” envisaged by the Charter include adoption of legislation, review and introduction of policies and other administrative or programmatic measures, including budgetary allocation, for children in accordance with laid down constitutional processes.<sup>740</sup>

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<sup>732</sup> Ibid, Article 17(2)(c)(i).

<sup>733</sup> This include the child’s entitlement to ‘the assistance of an interpreter if he or she cannot understand the language used.’

<sup>734</sup> Ibid, Article 17(2)(c)(ii).

<sup>735</sup> Ibid, Article 17(2)(c)(iii).

<sup>736</sup> Ibid, Article 17(2)(c)(iv).

<sup>737</sup> Ibid, Article 17(2)(d).

<sup>738</sup> Article 17(1) of the ACRWC provides categorically that: ‘Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of *dignity* and *worth* and which reinforces the child’s respect for human rights and fundamental freedoms of others.’ [Emphasis supplied]. See also Article 10 of the ACRWC.

<sup>739</sup> Lloyd, op. cit, p. 35.

<sup>740</sup> Article 1(8) of the ACERWC Guideline for Initial State Reports.

Imperative to these obligations, is the duty imposed on African states to promote positive cultural values and traditions ‘as well as measures which promote those traditions and values which are inconsistent with the rights, duties and obligations contained in the ACRWC.’<sup>741</sup> “Necessary steps” advanced in the Charter as part of obligations of states; pertain to introduction and implementation of mechanisms at the national or local level for coordination of policies and programmes relating children’s rights and welfare.

#### **4.4.2.4 The Procedural Framework of the ACRWC**

Like the CRC, the ACRWC’s implementation is monitored by a specialised body – the African Committee of Experts on the Rights and Welfare of the Child (ACERWC). The ACERWC was established in 2001 in accordance with Part II of the ACRWC. The ACERWC has extensive mandate than the UN Committee on the Rights of the Child (CROC), which ‘only has the jurisdiction to receive and comment on state reports submitted periodically.’<sup>742</sup> Apart from receiving and commenting on state reports, the ACERWC has the mandate to receive and consider individual communications and conducts ad hoc missions and onsite visits of states ‘considered to be violating their treaty obligations.’<sup>743</sup> Nonetheless, basing on the principle of complementarity that exists, the two instruments protecting the rights of the child in Africa should not be seen as opposing each other. On the contrary, they are complementary and mutually reinforcing.

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<sup>741</sup> Lloyd, op. cit, p. 36.

<sup>742</sup> Ibid, op. cit, p. 33.

<sup>743</sup> Ibid.

The ACERWC is composed of 11 independent members of high moral standing, integrity, impartiality and competence in matters pertaining to the rights and welfare of the child.<sup>744</sup> These members serve in their personal capacity and are elected from amongst nationals of member states.<sup>745</sup> Immediately after the ACRWC came into force on 29<sup>th</sup> November 1999, the OAU requested members to submit nominations; but by November 2000 only five names had been deposited. This delayed the establishment of the ACERWC until 2001. The tenure of committee members is five years only. Unlike under the CRC, the tenure of the members of the ACERWC is not renewable.

It is important to note, while assessing the work of the ACERWC, that it takes the principle of independence of its members seriously, unlike the African Commission on Human and Peoples' Rights (ACoMHPR). The history of the ACoMHPR reveals that Ambassadors and Ministers from member states have been elected to serve as commissioners. But the short history of the ACERWC reveals a sharp contrast to this practice. During the Committee's first composition, of the 11 members 3 resigned after they were elected to ministerial and diplomatic positions while still serving on the Committee.<sup>746</sup> As Lloyd concludes: 'It is positive to note that the members [of the ACERWC] take their role seriously and comply with such provisions. Not all human rights protection and monitoring bodies have adhered so rigorously to the requirements of impartiality and independence of committee members.'<sup>747</sup>

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<sup>744</sup> Article 33(1) of the ACRWC.

<sup>745</sup> Ibid, Article 35.

<sup>746</sup> Lloyd, *op. cit.*, p. 41.

<sup>747</sup> Ibid.



The ACERWC has adopted its own rules of procedure to enable it to carry out its mandate smoothly and effectively.

The ACERWC was established by the OAU at the time of its transformation to the AU. While the focus of the OAU was on political stability, peace and security, the AU focus has been more human rights-centred. This transition has impacted on the functioning of the ACERWC in many ways; significant to this analysis being budgetary deficiencies and inadequate staff to support its secretariat.<sup>748</sup> For instance, the Committee's first secretary was recruited in mid-2007 after five years of tussles amongst the committee members and the AU Commission.<sup>749</sup> Lloyd reveals that lack of certain funding has been one of the stumbling blocks the ACERWC has been facing since its establishment. According to Lloyd,

Due to the problems arising during the transitional period of the AU, the ACERWC has been [financially] resourced mainly through donations, inter-agency participation and collaboration. This has affected the work it has undertaken: there was a lengthy work plan from the outset, but when finance was not available, the ACERWC had to reduce its plans and rework priorities according to the donations received and conditions attached to some of the funding.<sup>750</sup>

At the same time, members did not appreciate 'that any proposal they want to undertake in the name of the ACERWC, such as country visits, should be circulated to the Chairperson of the Commission of the AU to prepare an estimated costing.'<sup>751</sup> This has delayed funding through the AU Commission, derailing the work of the ACERWC in effect.

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<sup>748</sup> Mashamba, C.J., "African Regional Human Rights Protection Mechanism: The Mandate of the ACERWC in Promoting Children's Rights in Africa." A paper presented to LL.M. Students (Human Rights) at Makumira Tumaini University, Arusha, on 23<sup>rd</sup> March 2012.

<sup>749</sup> Lloyd, *op. cit.*, p. 43.

<sup>750</sup> *Ibid.*, p. 43

<sup>751</sup> *Ibid.*

The above challenges apart, the ACERWC works with stakeholders including those who are not members to the ACRWC.<sup>752</sup> In the regard, it works with specialized institutions, inter-governmental organizations, and CSOs.<sup>753</sup> As Lloyd argues, this collaboration has helped the Committee to achieve its mission over the period since it was established.<sup>754</sup> In order to facilitate this collaboration, the ACERWC has adopted the Criteria for Granting Observer Status in conformity with Article 43 of the ACRWC and Articles 34, 37, 81 and 82 of its Rules of Procedure. These Criteria allow it to formally involve CSOs in its work relating to ‘preparation of complementary reports, submission of communications or undertaking of lobbying and/or investigation missions.’<sup>755</sup>

The mandate of the ACERWC is four-fold: (i) general mandate; (ii) reporting procedure; (iii) communications procedure; and, (iv) investigation procedure. In the first place, the general mandate of the ACERWC is that it serves as the guardian of children’s rights and welfare in Africa, whereby it can conduct any activity for the furtherance of children’s rights on the continent. As with the CRC, the ACERWC has the mandate to receive and consider initial and periodical reports submitted by states parties in accordance with Article 43 of the ACRWC. To be able to do

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<sup>752</sup> Mashamba, C.J., “The Mandate of the ACERWC and How CHRAGG Can Collaborate with the ACERWC in Order to Highlight the Issue of Children Detained in Adult Prisons in Tanzania.” A briefing paper presented by at the UNICEF-PRI workshop on “Developing Advocacy Strategies” held at UNICEF Conference Hall, Dar es Salaam, on 26-27 May 2011.

<sup>753</sup> Article 42, ACRWC; and Rules 78-81 of the Rules of Procedure.

<sup>754</sup> Lloyd, op. cit, pp. 43-44.

<sup>755</sup> Ibid, p. 44. See also Mezmur, B.D., “Still an Infant or a Toddler? The Work of the African Committee of Experts on the Rights and Welfare of the Child and its 8<sup>th</sup> Ordinary Session.” *African Human Rights Law Journal*. Vol. 7 No. 1, 2007.

discharge this mandate effectively, the ACERWC has adopted in Rules of Procedure for this purpose.<sup>756</sup> This mandate seems to be repetitive of the same mandate under the UN Committee on the Rights of the Child. In appreciation of this, the ACERWC has decided that

in order to avoid repetition, and in order to encourage governments to fulfil their obligations towards both committees, whilst recognising the specific nature of the several provisions of the ACRWC, if a state party has already submitted an initial report to the CRC committee, whether that report has been reviewed or not, that state party would be invited to update the information already submitted and add information on the different provisions contained in the ACRWC.<sup>757</sup>

Unlike the CRC Committee, the ACERWC has the mandate to receive and consider individual communications.<sup>758</sup> With this mandate the ACERWC is better positioned, unlike the CRC Committee, ‘to make a valuable contribution to the development of children’s rights through the receipt of communications and holding individual states accountable for violating the provisions and principles contained in the ACERWC.’<sup>759</sup> In this sense, communications can be made by any person, group of

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<sup>756</sup> Rules 66, 67, 68 and 69 of its Rules of Procedure.

<sup>757</sup> Lloyd, *op. cit.* p. 47 (note 26).

<sup>758</sup> Article 44 of the ACRWC.

<sup>759</sup> *Ibid.* Article 44. The first decision in the context of this provisions was made by the ACERWC in March 2011 in *Institute for Human Rights and Development in Africa (Banjul) and Open Society Justice Initiative (New York) (behalf of children with Nubian background in Kenya) v The Government of Kenya*. Communication No. Com/002/2009. In this matter, the ACERWC was seized in 2009 with a Communication submitted by the authors alleging the violations of a number of Charter rights of children of Nubian descent living in Kenya by the Government of Kenya. The Government of Kenya has ratified the Charter on 25 July 2000, and has undertaken the obligation to implement all the rights in the Charter. The Communication alleged that children of Nubian descent living in Kenya, descendants from Sudanese Nubian members of the British colonial armed forces, have suffered, and continue to suffer, a violation of their rights. In particular, the Communication alleged the systematic and discriminatory denial to these children of their right to acquire Kenyan nationality that is essential to the enjoyment of their protected human rights. Apart from the right against discrimination (Article 3 of the Charter) and the right to acquire a nationality (Article 6(3) of the Charter), the Communication alleged that the denial of nationality to these children also caused a subsequent violation of their rights to equal access to education (Article 11(3) of the Charter); access to health and health services (Article 14(2)(b) of the Charter); a violation of the prohibition against degrading treatment (Article 16 of the Charter); and an infringement of Article 20(2)(a) and (b) of the Charter requiring States Parties, in accordance with their means and national conditions, to take all appropriate measures to assist parents and other persons responsible for the child.

persons or NGO recognized by the AU, by a member state, or the UN. The communication must relate to the rights and welfare of the child covered in the ACRWC.

Furthermore, the ACERWC has the mandate to undertake investigations on violations of children's rights in any AU member state, which is not under the UN CRC Committee. This power, which is similar to that in the ACHPR empowering the AComHPR to do the same thing, is provided for in Article 45 of the ACRWC. In order to effectively achieve this mandate, the ACERWC has developed specific Guidelines on the investigations procedure. However, the effective implementation

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The ACERWC, after considering the Communication in accordance with its Guidelines for the Consideration of Communications, and offering both parties the opportunity to share their views, declared the Communication admissible in 2010. The same decision on admissibility has been communicated in good time to the authors and the Government of Kenya.

After successive requests made by the African Committee addressed to the Government of Kenya to share its views both on admissibility and the merits of the Communication failed, the ACERWC met on 22 March 2011 during its 17<sup>th</sup> Ordinary Session and considered the merits of the Communication. The ACERWC was of the view that the best interests of the children involved in the Communication demanded that a decision needed to be made without any further postponement and delay.

Therefore, the ACERWC, after a detailed consideration of the merits of the Communication, and based predominantly on the provisions of the Charter, but also by drawing inspiration from other relevant international and regional children's rights law and jurisprudence, found the Government of Kenya in violation of its obligations in:

- (i) Article 3 of the Charter on non-discrimination, as children with Nubian background in Kenya are systematically discriminated against by the state on the basis of multiple expressly prohibited grounds;
- (ii) Article 6(3) of the Charter, as children with Nubian background in Kenya are deprived of their right to acquire a nationality (with the effect that these children are at risk of statelessness);
- (iii) And as a result of the violation as outlined in A and B above, Article 11(3) of the Charter as the right to equal access to education is denied to children with Nubian background in Kenya;
- (iv) And Article 14(2)(b) of the Charter, as children with Nubian background in Kenya are denied equal access to necessary medical assistance and health care to all children with emphasis on the development of primary health care.

Since this decision was made in march 2011, the Government of Kenya did not implement it, prompting the ACERWC to decide (at its 19<sup>th</sup> Session held in Addis Ababa, Ethiopia, in March 2012) to undertake a mission in Kenya, which has been scheduled to take place in the second half of 2012. After this mission, the ACERWC will further recommendations to the Government of Kenya in respect of remedies that it deems appropriate in order to promote, protect, respect and fulfill the best interests of children of Nubian descent living in Kenya.

of this mandate is not realistic as the undertaking of investigations must be upon agreement with the state party concerned. As Lloyd argues, the provisions ‘are also wholly dependent on the extent to which states parties are prepared and willing to give full effect at a national level to any recommendations and proposals. Article 45 of the ACRWC will further require state party commitment to provide the necessary financial and logistical support to enable investigations by the ACERWC to occur.’<sup>760</sup>

All in all, the mandate and work of the ACERWC is very important to the realization of children’s rights and welfare in the African context. This is given further impetus by the provision for it to resort to other sources of information and inspiration from international law.<sup>761</sup>

#### **4.5 Conclusion**

The discussion in this Chapter has been devoted to the historical protection of children’s rights in the 20<sup>th</sup> century and its impact on contemporary protection of children’s rights at both the international and the African regional levels. The Chapter has tentatively traced the genesis of the notion of, and rationale for, children’s rights protection. It has also discussed modern trends in international children’s rights protection, whereby the protection mechanisms in the major international children’s rights instruments – including the CRC and the ACRWC – were examined in the contexts of their efficacy, implementation and applicability in

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<sup>760</sup> Ibid, pp. 49-50.

<sup>761</sup> Article 46 of the ACRWC.

municipal laws. In the context of this Chapter, the effectiveness of any human rights instruments is achieved only if there is an effective human rights protection mechanism that can render the treaty effective and meaningful to the people it is intended to serve.

## CHAPTER FIVE

### 5.0 STATE OBLIGATION TO DOMESTICATE INTERNATIONAL JUVENILE JUSTICE STANDARDS IN SOUTH AFRICA AND TANZANIA

#### 5.1 Introduction

In many countries around the world, ‘measures have been taken or are underway to bring existing laws, relevant to children in conflict with the law, in line with the provisions of the CRC, in particular article 40,<sup>762</sup> and Article 17 of the ACRWC. Whereas some countries, like Kenya<sup>763</sup>, The Gambia<sup>764</sup>, Tanzania<sup>765</sup> and Uganda<sup>766</sup>, have adopted a composite legislation constituting provisions for protection of rights of children in conflict with the law and those for the care and protection of children’s rights in a single text, others have adopted separate legislation for the two aspects of children’s rights. Whereas South Africa has adopted the latter approach<sup>767</sup> after it ratified the CRC in 1995<sup>768</sup> and the ACRWC in 2000<sup>769</sup>; Tanzania ratified the CRC in June 1991 and the ACRWC in 2003. This means that South Africa and Tanzania are bound to implement the two children’s rights instruments at the domestic level.

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<sup>762</sup> Doek, J., “Child Justice Trends and Concerns with a Reflection on South Africa.” In Gallinetti, J., et al (ed.), *Child Justice in South Africa: Children’s Rights Under Construction (Conference Report)*. Open Society Foundation for South Africa/Child Justice Alliance, August 2006, p. 12.

<sup>763</sup> Children’s Act (2004).

<sup>764</sup> Children’s Act (2005).

<sup>765</sup> Law of the Child Act (2009).

<sup>766</sup> Children’s Act (1996).

<sup>767</sup> Children’s Act (2005) and Child Justice Act (2008).

<sup>768</sup> South Africa ratified the CRC on 16<sup>th</sup> June 1995. 16<sup>th</sup> June of every year is the day when the Day of the African Child is celebrated on the African continent in commemoration of the massacre of black children in South African in 1976. In the post-apartheid period, the CRC was the first international human rights treaty to be ratified by South Africa. *See* particularly Sloth-Nielsen, J., “Ratification of the United Nations Convention on the Rights of the Child: Some Implications for South African Law”. *South African Journal of Human Rights*. Vol. 11, 1995, p. 401; and Odongo, G.O., “The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context.” LL.D. Thesis, University of Western Cape, 2005, p. 72 (note 18).

<sup>769</sup> South African signed the ACRWC on 10<sup>th</sup> October 1997, ratified it on 7<sup>th</sup> January 2000 and deposited the instrument on 21<sup>st</sup> January 2000.

Under both the CRC and ACRWC, all countries that have ratified these instruments have an obligation to implement them at a two-tier level. In the first place, ratifying countries have an obligation to implement these instruments through the international norm enforcement mechanism. In the second place, the ratifying countries have obligations to implement the instruments at the domestic level.<sup>770</sup>

The discussion that follows in this Chapter, therefore, examines the specific state obligations to domestic the international juvenile justice standards in both South Africa and Tanzania in the constitutional and legal contexts. The aim of this Chapter is to set out a constitutional basis for the examination of the relevant juvenile justice related laws in the two countries as set out in Chapters Six and Seven.

## **5.2 The Status of the CRC and the ACRWC in the Domestic Legal Order in South Africa and Tanzania**

The domestication of international child law in municipal law depends largely on the system applicable for the domestication of international treaties in each and every country.<sup>771</sup> There are mainly two systems applicable to the domestication of international treaties in municipal law, namely, the monist; by which international conventions are directly incorporated into law, and the dualist system under which treaties can only be incorporated into national law by domestic statute.<sup>772</sup>

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<sup>770</sup> Odongo, G.O., “The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context”, op. cit, p. 68.

<sup>771</sup> See particularly Odongo, G.O., ibid, p. 73; and Veerman, P. and B. Gross, “Implementation of the United Nations Convention on the Rights of the Child in Israel, the West Bank and Gaza”. *The International Journal of Children’s Rights*. Vol. 3, 1995, p. 297.

<sup>772</sup> Odongo, ibid. See also Mapunda, B.T., “Treaty Making and Incorporation in Tanzania.” *East African Law Review*. Vol. 28-30, December 2003.



The CROC, in its General Comment No. 5 on “General Measures”<sup>773</sup> of the implementation of the CRC, has given endorsement through its interpretation of the system by which a state can domesticate international treaties.<sup>774</sup> But, to a large extent, ‘the system chosen by a state can be deduced from looking at the state’s law and practice with respect to different international instruments.’<sup>775</sup> All common law countries fall within the dualist system,<sup>776</sup> which means that all such countries have to domesticate the principles enshrined in the CRC and the ACRWC through domestic statutes.<sup>777</sup> So, Tanzania has domesticated the principles enshrined in the CRC and the ACRWC through the dualist approach, meaning that it has enacted a specific legislation to that effect. The South African position is founded on the commonality of the Roman-Dutch law common system, which also requires the passing of domestic laws to give effect to international law.<sup>778</sup> Apart from enacting specific pieces of legislation to domestic international child rights law, the South African Constitution (1996) provides that a court, tribunal or forum “must consider” international law when interpreting the Chapter of the Constitution that constitutes

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<sup>773</sup> CROC, *General Comment No. 5*: “General Measures of Implementation for the Convention on the Rights of the Child.” CRC/GC/2003/5 (Adopted at the 34<sup>th</sup> session on 27 November 2003).

<sup>774</sup> *Ibid*, paras 18-20.

<sup>775</sup> Odongo, *op. cit*, quoting <sup>23</sup> Lindholt, L., *Questioning the Universality of Human Rights: The African Charter on Human and Peoples’ Rights in Botswana, Malawi and Mozambique*. Aldershot/Vermont: Ashgate/Dartmouth, 1997, p. 85.

<sup>776</sup> See particularly Brownlie, I., *Principles of Public International Law*. 4<sup>th</sup> edn. Oxford: Clarendon Press, 1995, p. 43; and Sloth Nielsen, J., “Children’s Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child”. *International Journal on Children’s Rights*. Vol. 10, 2002, p. 138.

<sup>777</sup> For instance, Kenya in its Initial State Report on the CRC presented to the CROC and examined at the Committee’s 27<sup>th</sup> session in 2001 explained that: ‘The Constitution of Kenya does not specify the methods for transforming international treaties into municipal law. Kenya’s practice follows the English one whereby for a treaty to apply, Parliament must pass an enabling Act to give effect to it’. See CROC, *Kenya Initial Report to the CROC*. CRC/C/3/Add.62, 16 February 2001, para 46. On its part, Article 63(3)(e) of the Constitution of the United Republic of Tanzania (1977) empowers Parliament to ratify international treaties signed by Tanzania before they become applicable at the municipal level.

<sup>778</sup> Odongo, *op. cit*, p. 75 (noted 25).

the Bill of Rights.<sup>779</sup> It also requires that in such interpretation, a court, tribunal or forum must ‘promote the values that underlie an open and democratic society based on human dignity, equality and freedom’.<sup>780</sup> Such constitutionalisation of international children’s rights standards in the South African Constitution has been behind a number of important judicial decisions based on children’s rights.<sup>781</sup> In principle,

A number of these decisions have dealt with juvenile justice, including the abolition of judicially imposed sentence of whipping by the constitutional court,<sup>782</sup> decisions on the need to limit the duration of incarceration of juveniles,<sup>783</sup> and decisions affirming a constitutional imperative to restrict the use of life imprisonment for persons under 18 years of age.<sup>784</sup>

As part of their international obligations, ratifying states are required to submit progressive reports to the UN Committee on the Rights of the Child (CROC) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).<sup>785</sup> The second aspect of states’ obligations under the two instruments – domestic implementation – is of great significance;<sup>786</sup> because ‘the success or failure of any international human rights treaty should be evaluated in accordance with its

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<sup>779</sup> Section 39(1)(b) of the South African Constitution (1996).

<sup>780</sup> Ibid, Section 39(1) (a).

<sup>781</sup> Odongo, op. cit, p. 107.

<sup>782</sup> In *S v Williams and Others* 1995 (3) SA 632 (CC) it was held that judicial corporal punishment was unconstitutional. This holding was grounded in the CRC provisions on the right to protection from cruel, inhuman and degrading treatment in enshrined in Article 37.

<sup>783</sup> In *S v Kwalase* 2000 (2) SACR 135 (CPD); and *S v J and Others* 2000 (2) SACR 310 (C) the CRC provisions regarding detention (Art 37) and the “soft law rules” on juvenile justice regarding the principle of detention as a last resort, were judicially considered.

<sup>784</sup> Odongo, op. cit, p. 107. In *Brandt v S* [2005] 2 ALL SA 1 (SCA) the court considered the validity of the imposition of life imprisonment on persons under 18 within the framework of a minimum sentence legal regime in South Africa, and in light of the South African Constitution, CRC and the “soft law” instruments on juvenile justice.

<sup>785</sup> The mandate, reporting and monitoring mechanisms of the CROC and ACERWC are discussed at length in Chapter 3 above.

<sup>786</sup> Heyns, C. and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*. The Hague: Kluwer Law International, 2002, p. 1.

impact on human rights practices at the domestic level.<sup>787</sup> As discussed in Chapter 3 above, under both the CRC and the ACRWC, States Parties' obligations to implement these instruments in their respective jurisdictions are couched in such phraseology as States Parties shall take "measures to implement provisions and principles" in these instruments. As elucidated in Chapter 3, the "measures" envisaged include adoption of legislation, review and introduction of policies and/or other administrative or programmatic measures, including budgetary allocations, for children in accordance with the laid constitutional and/or principles and processes.

The scope of domestic obligations imposed on the ratifying states by the international children's rights law has been expounded by the CROC in its General Comment on "General Measures"<sup>788</sup> on the implementation of the CRC. The CROC has expounded different mechanisms that are to be put in place and implemented at the domestic level. According to Odongo,

These include the need for a comprehensive national strategy such as a National Plan of Action (NPA) on Children, independent human rights institutions such as children's ombudspersons and national human rights commissions, making children visible in budgets, training and capacity building, international co-operation within a rights-based development assistance approach and local cooperation with civil society, amongst other measures.<sup>789</sup>

In principle, the CROC has made it clear that 'it believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation.'<sup>790</sup>

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<sup>787</sup> Odongo, op. cit, pp. 68-9.

<sup>788</sup> CROC, *General Comment No. 5*: "General Measures of Implementation for the Convention on the Rights of the Child." CRC/GC/2003/5 (Adopted at the 34<sup>th</sup> session on 27 November 2003).

<sup>789</sup> Odongo, op. cit, p. 70.

<sup>790</sup> CROC, *General Comment No. 5*, op. cit.

With regard to juvenile justice both Article 17 of the ACRWC and Article 40 of the CRC require that States Parties to take necessary measures for the full realisation of basic rights by children who come into conflict with the law. For instance, Article 40(3) of the CRC requires States Parties to adopt ‘laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.’ This obligation ‘has been interpreted not only as requiring, at a minimum, that states establish juvenile justice systems but is also increasingly being construed as implying the need for distinct and dedicated legislation in the sphere of juvenile justice upon ratification of the Convention.’<sup>791</sup>

From this exposition, it can be noted that ‘the interpretation of the obligation to undertake juvenile justice law reform as requiring separate and distinct legislation dedicated to juvenile justice influenced the South African law reform process.’<sup>792</sup> This has resulted in the enactment, by the Government of the Republic of South Africa, of the Child Justice Act, which is solely dedicated to juvenile justice; and the Children’s Act, which is dedicated to issues of child protection, care and welfare. In Tanzania, the Government has just enacted a composite Law of the Child Act, which combines provisions for child protection, care and welfare, on the one hand; and those regulating juvenile justice on the other.

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<sup>791</sup> Odongo, *op. cit.*, p. 71. *See also* Skelton, A., “Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice.” In Keightley, R. (ed.), *Children’s Rights*. Kenwyn: Juta and Co., 1996, p. 183.

<sup>792</sup> Odongo, *ibid.*

### **5.3 ‘Direct’ Constitutionalisation of International Children’s Rights Law in South Africa**

South Africa has constitutionalised standards in the CRC and ACRWC in its 1996 Constitution, which contains several provisions giving domestic application to international children’s rights standards. In the main, the South African Constitution ‘acknowledges that children are physically and psychologically more vulnerable than adults.’<sup>793</sup> It contains provisions protecting children’s rights, which entails the statement that children have the right not to be detained except as a measure of last resort and then for the shortest appropriate period of time, separate from adults and in conditions that take account of his her age. Therefore, in this section we look at the constitutionalisation of children’s rights in South Africa, in general, and the juvenile justice provisions, in particular.

#### **5.3.1 The Status of International Children’s Rights Law in South Africa**

Even before the adoption of the 1996 South African Constitution, children’s rights were given due recognition by the courts. This was a result of the ratification of the CRC by South Africa in 1995. For instance, one of the earliest cases to come before the newly constituted South African Constitutional Court (as a creature of the 1996 Constitution) was *S v Williams*,<sup>794</sup> which dealt with the sentence of corporal punishment. Until then corporal punishment was a sentence commonly used for the punishment of children by the courts in South Africa. Thus, in this case, the court

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<sup>793</sup> Ballard, C., “Youthfulness and Sentencing Prior to the Operation of the Child Justice Act: A Case Review of *Fredericks v The State*.” *Article 40*, Vol. 14 No. 1, April 2012.

<sup>794</sup> (1995) 3 SA 632 (CC).

struck down corporal punishment on the grounds that it was cruel, inhuman and degrading treatment. According to Section 231(2) of the South African Constitution,

2. An international agreement binds the Republic (of South Africa) only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

Under Section 231(4) an international agreement shall become law in South Africa when it is enacted into law by Parliament, save for self-executing provisions of the agreement, unless it contravenes the Constitution or national legislation. Legally speaking, this means that ‘South Africa generally has a dualist approach whereby an international instrument requires parliamentary approval for ratification and once ratified it must be domesticated before it can have the force of law nationally.’<sup>795</sup>

Furthermore, Section 231(5) binds South Africa to international agreements which were before the entry into force of the 1996 Constitution. In terms of Section 39(1)(b) of the Constitution of South Africa, provisions of international law – including those of the CRC and the ACRWC – can be relied upon by the courts when interpreting the Bill of Rights.<sup>796</sup> In *Government of the Republic of South Africa v Grootboom and Others*<sup>797</sup> (the *Grootboom* case), the South African Constitutional Court held that:

... the relevant international law can be a guide to interpretation but the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.

<sup>795</sup> Saine, M., “Protecting the Rights of Children in Trouble with the Law: A Case Study of South Africa and The Gambia.” LL.M. Thesis, University of Pretoria, 2005, p. 21.

<sup>796</sup> For a detailed discussion, see Dugard, J., “The Role of International Law in Interpreting the Bill of Rights.” *South African Journal on Human Rights*. Vol. 10 No. 1, 1994.

<sup>797</sup> 2000 (11) BCLR 1169 (CC).

Parallel to this constitutional rule, are the provisions of Section 233, which provides that when interpreting any law, a court must prefer an interpretation that is consistent with international law ‘to which is consistent with it.’<sup>798</sup> In addition, Section 39 thereof sanctions courts to invoke international human rights law while interpreting provisions of the 1996 Constitution. It categorically provides that:

When interpreting the Bill of Rights, a court, tribunal or forum ... must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; must consider international law; and may consider foreign law.

In *S v Makwanyane*,<sup>799</sup> the South African Constitutional Court held that international law, in this regard, includes both binding and non-binding international law.

Interestingly, the foregoing constitutional provisions have been given binding force by the enactment of the Child Justice Act.<sup>800</sup>

### **5.3.2 Protection of the Rights of Child Offenders in the South African Constitution**

The Constitution of South Africa (1996), regarded as one of the most progressive constitutions in modern time,<sup>801</sup> protects children’s rights through the Bill of Rights. In essence, it affords children ‘a specific set of rights designed to nurture and protect

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<sup>798</sup> Saine, M., op. cit, p. 21.

<sup>799</sup> 1995 (3) SA 391 (CC), para 55.

<sup>800</sup> See particularly section 5.6.1 of this Chapter.

<sup>801</sup> Mashamba, C.J., “Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights.” LL.M. Thesis, Open University of Tanzania, 2007 (note 401). This Constitution has been referred to as one of the most progressive Constitutions in the world today, mainly because of the inclusion of economic, social and cultural rights in the Bill of Rights. It also goes as far as to provide for prisoners’ rights to adequate accommodation, nutrition, and medical treatment. [Section 35(2e)]. The Constitution is also progressive in terms of constitutionalising children’s rights generally and rights of children in conflict with the law particularly.

their particular interests and development.’<sup>802</sup> In this context, the rights of the child protected in the Bill of Rights are grouped into two categories: general as well as specific child rights. Notably, the South African Bill of Rights contains two important drafting styles in respect of the inclusion of children’s rights in the 1996 Constitution.<sup>803</sup> Firstly, the rights of “*everyone*”, including children, to realise his or her rights as contained the Bill of Rights, including having access to adequate housing, health care services, food, water, and social security, as contained in sections 26 and 27.<sup>804</sup> Also relevant in this regard is the right to further education in Section 29(1) (b).

The second drafting style used in the Bill of Rights in the South African Constitution in respect of children’s rights is the *express* approach; that is, specific children’s rights are stipulated in Section 28 of the Constitution, which include rights of children deprived of their liberty. The rights in Section 28(1)(c) ‘are neither described as a right of “access to” the relevant rights, nor are they qualified in a similar form to the second subsections of Sections 26 and 27.’<sup>805</sup> Seemingly, the absence of *qualification* in Sections 28(1)(c) and 29(1)(a) relates to the fact that these rights ‘impose a direct duty on the State to ensure that those children who lacked these basic necessities of life are provided with them without delay.’<sup>806</sup> In *Grootboom*, the Constitutional Court held that the State is obliged to ‘provide the

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<sup>802</sup> Ballard, C., “Youthfulness and Sentencing Prior to the Operation of the Child Justice Act: A Case Review of *Fredericks v The State*”, op. cit.

<sup>803</sup> Mashamba, C.J., “Enforcing Social Justice in Tanzania: The Case of Economic and Social Rights”, op. cit.

<sup>804</sup> Liebenberg, S., “Taking Stock: The Jurisprudence on Children’s Socio-Economic Rights and its Implications for Government Policy.” *ESR Review*. Vol. 5 No. 4, September 2004, p. 3.

<sup>805</sup> Ibid.

<sup>806</sup> Ibid.



legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated by Section 28.<sup>807</sup> This obligation would normally ‘be fulfilled by passing laws and creating enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in Section 28.’<sup>808</sup>

Therefore, in compliance with this international obligation, South Africa first has constitutionalised the rights of the child, which specifically include the rights of children accused of committing criminal offences. As such, the discussion below details the extent of protection of general rights of the child and those of juvenile delinquents in the Constitution of South Africa.

### **5.3.2.1 General Child Rights in the South African Constitution**

The general provisions that protect children’s rights in the South African Constitution include those enshrined in Sections 12 and 35. Under Section 28(3) a child is defined as any person below 18 years, which means that any person below 18 years ‘is entitled to the protection under Section 28 without any discrimination.’<sup>809</sup>

Discrimination against “any one” – including children in conflict with the law or those deprived of their liberty – is prohibited under Section 9(3). This provision enlists the ground for discrimination, including prohibition of discrimination based on race, gender, age, sex, disability, language, birth, culture, religion, ethnic or social origin. The prohibition of discrimination in the South African Constitution is in tandem with the provisions of Article 1 of the CRC and Article 2 of the ACRWC.

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<sup>807</sup> *Grootboom*, op. cit, para. 78.

<sup>808</sup> *Ibid.*

<sup>809</sup> *Saine*, op. cit, p. 24.

The principle of the best interests of the child is also provided for in Section 28(2) of the South African Constitution in the context of the CRC<sup>810</sup> and ACRWC.<sup>811</sup> In this context, this section demands that the best interests of the child are paramount in every matter – action and/or decision – concerning children; which should also be the guiding principle on any decision or action taken against or relating to a child deprived of his/her liberty. Nevertheless, this principle has been criticised by some writers for being ‘too broad and vague and has failed to provide a reliable and determinate standard.’<sup>812</sup> However, Goldstone, J., disagreed with this criticism in *Minister for Welfare and Population Development v Fitzpatrick*,<sup>813</sup> observing that the best interests of the child rule should not be given exhaustive content; rather, it should be flexible in order to provide for the needs of specific children in specific circumstances. Similarly, the CROC has not provided any exhaustive criteria on the principle; but has emphasised that ‘in every decision or action consideration must be made on how it will affect the child’s rights and interests.’<sup>814</sup>

In addition, Section 28(1)(d) of the South African Constitution provides that every child should be protected from neglect, abuse or degrading, or inhumane treatment. This protection applies to a child ‘at any period of time including when deprived of their liberty.’<sup>815</sup> This section complements Section 12(c), (d) and (e), which prohibits

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<sup>810</sup> Article 3, CRC.

<sup>811</sup> Article 4, ACRWC.

<sup>812</sup> Saine, op. cit, p. 24. See also De Waal, J. et al, *The Bill of Rights Handbook*. Cape Town: Juta & Co. Ltd., 2001.

<sup>813</sup> [2000] 6 BCLR 713 (CC) 18.

<sup>814</sup> CROC, *General Comment No. 5*, op. cit, para 13.

<sup>815</sup> Saine, op. cit, p. 25.

all forms of violence, torture, cruel, inhumane and degrading treatment against any person, including children.

### **5.3.2.2 Specific Rights of Child Offenders in the South African Constitution**

Specifically, Section 28(1)(g) of the South African Constitution protects the rights of children in conflict with the law in that it makes mandatory that detention of such children should not be applied; unless it is applied as a matter of last resort and for the shortest appropriate period of time only. Augmenting international juvenile justice principles, the South African Constitution ‘recognises the fact that lengthy periods of imprisonment are generally harmful to children.’<sup>816</sup> In similar terms with the CRC, the section does not provide an exhaustive guide ‘as to what amounts to “measures of last resort.”’<sup>817</sup> Nonetheless, it is important that ‘alternative measures must be employed to deal with the child and detention must always be the last option when these measures are not appropriate in the circumstances. In the event the child is detained then it must not be for longer than necessary.’<sup>818</sup>

In this particular section, the South African Constitution provides for separation of juveniles detained from adult detainees. It also requires that juveniles deprived of their liberty should be treated in a manner and kept in conditions appropriate to their

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<sup>816</sup> Ballard, C., “Youthfulness and Sentencing Prior to the Operation of the Child Justice Act: A Case Review of *Fredericks v The State*”, op. cit.

<sup>817</sup> Saine, op. cit.

<sup>818</sup> Ibid. See particularly, Article 37(b) of the CRC; and Rule 1 of the UN Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules).

age and maturity, which is in line with international standards of the administration of juvenile justice.<sup>819</sup>

In terms of Section 28(1)(h), the Constitution of South Africa guarantees the right of every child to free legal assistance in criminal proceedings paid for the state in cases where “substantial injustice” would otherwise result.<sup>820</sup> This right is equally availed for children as well as adults in criminal proceedings. The phrase “substantial injustice” has been described by Skelton to include cases where a child is on trial and he or she does not have a lawyer.<sup>821</sup>

Section 12 specifically protects children against physical restraints such as detention and imprisonment. In essence, it guarantees both procedural and substantive rights persons (including children) deprived of their liberty. In case there is such deprivation, the State is obliged to furnish reasons for deprivation of ‘every child and no child shall be detained without due process of law.’<sup>822</sup> In addition, this section protects children against torture, cruel, inhumane and degrading treatment, which include corporal punishment and death penalty. In strict compliance to these provisions, in *S v Makwanyane*<sup>823</sup> the South African Constitutional Court held that death penalty amounts to cruel, inhumane and degrading treatment; thus, it outlawed

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<sup>819</sup> See particularly Article 10(2)(b), ICCPR; Articles 37(c) and 40(1), CRC; and Article 17(1) and (2)(b), ACRWC.

<sup>820</sup> See also Section 35(3)(g) of the Constitution of South Africa.

<sup>821</sup> Skelton, A. (ed.), *Children and the Law*. Pretoria: Lawyers for Human Rights, 1998, p. 154. See also Skinnider, E., “The Responsibility of States to Provide Legal Aid.” The International Centre for Criminal Law Reform and Criminal Justice Policy. A paper prepared for the legal aid conference in Beijing, China, March 1999, p. 9. Available at [www.icclr.law.ubc.ca/Publications/beijing.pdf](http://www.icclr.law.ubc.ca/Publications/beijing.pdf) (accessed 10 January 2012).

<sup>822</sup> De Waal, et al, op. cit, p. 247.

<sup>823</sup> *S v Makwanyane*, op. cit.

it in consequence. On a similar feat, the Constitutional Court outlawed corporal punishment in *S v Williams*<sup>824</sup> on the basis of this section.

In a more progressive approach, Section 35 of the Constitution of South Africa provides for the basic due process rights in the criminal justice – from the arrest stage to the sentencing stage. For instance, it provides that child deprived of his or her liberty must be released from detention if the interest of justice so permits, but subject to reasonable conditions.<sup>825</sup> In application, this section should be read together with Section 28(g) that requires that detention of children should be a matter of last resort. In terms of Section 35(2)(d) of the Constitution, a child has a right to challenge the lawfulness of detention imposed upon her or him.

Viewed in the above sense, as De Waal contends, although these due process rights in the South African Constitution do not seek to replace the statutory and common law principles governing the administration of criminal justice in South Africa,<sup>826</sup> ‘the latter must comply with the provisions of the Bill of Rights and the rest of the [South African] Constitution.’<sup>827</sup>

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<sup>824</sup> *S v Williams*, op. cit.

<sup>825</sup> Section 35(1)(f) of the Constitution of South Africa (1996).

<sup>826</sup> De Waal, et al. Op. cit, p. 585.

<sup>827</sup> Saine. Op. cit, p. 26.

#### **5.4 ‘Indirect’ Constitutionalisation of International Children’s Rights Law in Tanzania**

The Constitution of the United Republic of Tanzania does not “directly” protect children’s rights<sup>828</sup>; rather it “indirectly” protects the basic rights and fundamental freedoms of every person in general terms. The term “every person”, in the context of Section 4 of the Interpretation of Laws Act<sup>829</sup>, means any word or expression descriptive of a person, which includes a child. Therefore, children are entitled to all the rights and freedoms set out in Articles 12 to 24 of the Constitution of Tanzania. In terms of Article 13(5) of the Constitution, discrimination of persons, including children, is prohibited.

As we indicated in section 5.2 above, Tanzania ratified the CRC in June 1991 and ratified the ACRWC in February 2003 without any reservations, meaning that: ‘Tanzania has undertaken to bring her domestic legislation in line with all the provisions of (these international instruments on the rights of the child).’<sup>830</sup> Certainly, this is in accord with the recommendations of the CROC, which has, on regular occasions, been emphasizing that it is an essential aspect of States Parties

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<sup>828</sup> Legal and Human Rights Centre and Zanzibar Legal Services Centre, *Tanzania Human Rights Report 2010*. Dar es Salaam: Legal and Human Rights Centre and Zanzibar Legal Services Centre, 2011, p. 177 (quoting Clement Mashamba, a human rights lawyer in Tanzania and a member of the African Committee of Experts on the Rights and Welfare of the Child (ACERWC)). It is only hoped that the ongoing constitutional review process will address this issue in order for the envisaged new constitution to have express provisions on child rights and child justice as is the case with South Africa.

<sup>829</sup> Cap. 1 R.E. 2002.

<sup>830</sup> See Mashamba, Clement J., “Basic Principles to be Incorporated in the New Children Statute in Tanzania.” In Mashamba, C.J. (ed.), *Using the Law to Protect Children’s Rights in Tanzania: An Unfinished Business*. Dar es Salaam: National Organization for Legal Assistance (nola), 2004, p. 107.

thereto, while implementing the CRC, to ensure that all domestic legislation is “fully compatible” with the provisions and principles of the CRC.<sup>831</sup>

In respect of Tanzania, the CROC, in its Concluding Observations in respect of the country’s initial report (1998) and the second periodic report (1998-2003), was concerned ‘at the lack of a clear time frame (for Tanzania) to finalize the consultative process and enact “The Children’s Act.”’<sup>832</sup> It should be noted that, in its second periodic report to the CROC (1998-2003), Tanzania reported that it was undertaking legislative review and collecting views of stakeholders, including children, through the national ‘White Paper.’ It was reported that the National White Paper would engender “The Children’s Act.”<sup>833</sup> Nevertheless, the CROC urged Tanzania to:

[E]ngage all efforts and resources necessary for the enactment of the Children’s Act in Tanzania Mainland and a similar Act in Zanzibar, as a matters of priority. It further [urged Tanzania] to ensure that all of its domestic and customary legislation [should] conform fully to the principles and provisions of the Convention, and ensure its effective implementation.<sup>834</sup>

However, when the lawmaking process was hastily undertaken by Tanzania in 2009 several anomalies were discerned. First, Zanzibar<sup>835</sup> and Tanzania Mainland<sup>836</sup> decided to enact separate child laws simply because children’s issues are not enlisted

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<sup>831</sup> Ibid.

<sup>832</sup> See CROC, “Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,” CRC/C/TZA/CO/2, dated 2<sup>nd</sup> June, 2006, para 9.

<sup>833</sup> See United Republic of Tanzania, “The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003,” Ministry of Community Development, Gender and Children; August, 2004. See also United Republic of Tanzania, “Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15<sup>th</sup>-19<sup>th</sup> May, 2006, in Geneva, Switzerland,” Ministry of Community Development, Gender and Children; April 2006.

<sup>834</sup> See CROC, “Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,” op. cit, para 10.

<sup>835</sup> See the Zanzibar Children’s Act (2011).

<sup>836</sup> See the Law of the Child Act (2009).

in the list of Union Matters. Second, the process, at least in Tanzania Mainland, did not take enough time to enable wide consultations and adequate considerations of international child rights standards to be domesticated in the laws. Third, the child laws both in Zanzibar and Tanzania Mainland did not come out with coordination bodies of the various child rights stakeholders. Fourth, the two constitutions<sup>837</sup> were not amended so as to constitutionalize children's rights, particularly those rights relating to juvenile justice.

As a result of the foregoing anomalies, the two child laws in Tanzania Mainland and Zanzibar have failed to do away with the problems that were inherent before these laws were not enacted. As indicated in this study<sup>838</sup>, the absence of a comprehensive child statute that would effectively protect children rights in Tanzania had, for a long time, exacerbated the worsening state of children rights in Tanzania.<sup>839</sup> As the CRC Committee had noted, there are many laws (or legal provisions) in existence in Tanzania that, in one way or another, adversely affect the rights and welfare of the child in the country. For instance, the provisions Section 13 of the Law of Marriage Act, 1971, which allow a girl of 14 or 15 years to get married and a boy below 18 years not to do so, are discriminatory as they provide inequitable treatment between girls in the same country. This is contrary to the provisions of Article 2 of the CRC, which prohibits children in the same country to be dealt with differently.

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<sup>837</sup> See the Constitution of the United Republic of Tanzania (1977) and the Zanzibar Constitution (1984).

<sup>838</sup> See Chapter Six of this Study.

<sup>839</sup> See Mashamba, C.J., "Basic Principles to be Incorporated in the New Children Statute in Tanzania", op. cit.



According to the Law Reform Commission of Tanzania (LRCT), this age structure has been criticized and various reasons have been advanced for change. The LRCT report mentions the reasons as follows: first, there are medical reasons which entail the reason that:

[I]t is unhealthy and dangerous for a girl below the age of 20 years to give birth to children. The girl may become deformed and even lose life while giving birth. A child born by such a mother may be deformed and become a weakling. There is ample medical evidence that many mothers of tender age give birth by way of operation which is dangerous for the life of the mother.<sup>840</sup>

Second, there are legal reasons to the effect that the ‘marriage contract has far reaching obligations than normal commercial contracts. The minimum age under the Law of Marriage Act is far too low in comparison with other laws such as the law of contract or election law.’<sup>841</sup> According to Section 11(1) of the Law of Contract Act,<sup>842</sup> a person under the age of eighteen is not competent to enter into a lawful contract, although he or she may only enter into contract as an infant for necessities. At the same time, a person below the age of 18 years is denied a right to vote or to be voted for under Article 5(1) of the Constitution and the National Elections Act (1985)<sup>843</sup>. For that matter, the LRCT report says that: ‘It has been argued that a girl below the age of 18 years may easily be coerced into a marriage by greedy parents and cause a lot of miseries to the girl in her married life.’<sup>844</sup>

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<sup>840</sup> See Law Reform Commission of Tanzania, “Report on the Law of Marriage Act, 1971(Act No. 5 of 1971,” submitted to the Minister of Justice and Constitutional Affairs, April 1994, para 1.6.1.

<sup>841</sup> Ibid, para 1.6.2.

<sup>842</sup> Cap. 433 R.E. 2002.

<sup>843</sup> Cap. 343 R.E. 2002.

<sup>844</sup> See Law Reform Commission of Tanzania, “Report on the Law of Marriage Act, 1971(Act No. 5 of 1971”, op. cit, para 1.6.5.

Third, there are social reasons contending that, “early marriage deprive girls of opportunities to learn a trade of their choice or to continue with other post primary School training. On the other hand, for those who argued in favour of the present minimum age structure (15 years for girls and 18 years for boys), advanced the following reasons:

First, some traditional communities recognize that once a girl attains puberty (*kuvunja ungo*) is considered as a grown up woman and capable of being married. Most of the girls reach puberty between the age of 10 to 15 years. Secondly, the statutory age for Primary School is at the age of 7 years he or she will complete compulsory Primary School education at the age of 14 years. If a girl does not continue with post Primary School training she will stay at home with her parents who argue that it is desirable to get such girls married off at the earliest possible moment to avoid embarrassments of child bearing out of wedlock.<sup>845</sup>

In the opinion of the LRCT, there is a need to change the existing age structure for marriage which should be 21 years for both males and females. This age structure is slightly different from the CRC’s approach, which is 18 years.

Another provision of the law that is repugnant to the principles of the CRC and the ACRWC is contained in the National Education Act,<sup>846</sup> particularly the National Education Corporal Punishment Regulations (Control of Administration of Corporal Punishment in Schools) (1979) and the National Education (Expulsion and Exclusion of Pupils from Schools) Regulations (1979). Whereas the former allows administration of corporal punishment in schools, the latter provides, *inter alia*, for expulsion of impregnated school girls from primary schools.

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<sup>845</sup> Ibid.

<sup>846</sup> Cap. 353 R.E. 2002.

At the same time, the Customary Law Declaration Order<sup>847</sup> and the Local Customary Law (Declaration) Order (1963)<sup>848</sup> contain several discriminatory provisions which impact on children, particularly girls. In particular, these codified customary laws discriminate illegitimate and girl children from inheriting their deceased male parents' estates. In *Elizabeth Stephen & Another v A.G.*<sup>849</sup> the High Court of Tanzania found several paragraphs of these customary laws to be 'discriminatory in more ways than one.'<sup>850</sup>

The absence of a comprehensive statute for promoting and protecting children rights in Tanzania had caused serious predicaments to children in Tanzania, including rampant child abuses, neglect, school drop outs, early pregnancies, and early marriages.<sup>851</sup>

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<sup>847</sup> G.N. No. 279 of 1963.

<sup>848</sup> No. 4 of 1963), GN 436/63, Third Schedule.

<sup>849</sup> High Court of Tanzania at Dar es Salaam, Miscellaneous Civil Cause No. 82 of 2005 (unreported).

<sup>850</sup> However, it was hesitant to declare them unconstitutional on the basis of the test of "the best interest to give the orders prayed for;" that is, first, "a declaration that the said paragraphs are null and void and unconstitutional;" secondly, "the said paragraphs be struck out;" and, finally, "the Respondent be given specific time to amend the law accordingly." In support of its approach, the High Court based its abstaining tendency on the fact that the Order (that is, Cap 358 R.E. 2002) declared and recognized "some of the customs of the people which were there for many years before." According to the Court, "these customs evolved and change with time, a process that does not end, nor can it be ended."

<sup>851</sup> However, even after the enactment of the Law of the Child Act in 2009 these problems are still prevalent. For a detailed account on problems facing children in Tanzania see United Republic of Tanzania, "Country Second CRC Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003," Dar es Salaam: Ministry of Community Development, Gender and Children, August 2004; CROC, "Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania," 02/06/2006, CRC/C/TZA/CO/2; and CROC, "Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania," 09/07/2001, CRC/C/15/Add.156. Others include Research and Analysis Working Group, *Poverty and Human Development Report 2005*. Dar es Salaam: Mkuki na Nyota Publishers, 2005; Legal and Human Rights Centre, *The State of Juvenile Justice*, Dar es Salaam: Legal and Human Rights Centre, 2003; Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*. Dar es Salaam: Tume ya Haki za Binadamu na Utawala Bora, 2004; United Republic of Tanzania, "Report of Tanzania Law Reform Commission on the Law Relating to Children in Tanzania", submitted to the Minister of Justice and Constitutional Affairs, April 1994; Mashamba, C.J., "Basic Elements and Principles to be

As a result of these anomalies facing children in Tanzania, many studies undertaken in the field of children rights in Tanzania have called upon the Government to enact a single legislation that would effectively protect children rights and welfare in the country.<sup>852</sup>

### 5.5 Legislative Action in Favour of Juvenile Justice in South Africa

The administration of juvenile justice in South Africa is currently governed by the Child Justice Act (2008),<sup>853</sup> launched for implementation on 1 April 2010. The process for the enactment of this law began back in 1996 with the establishment of the South African Law Reform Commission (SALRC)'s Project Committee on Juvenile Justice. A Bill for this law was prepared in 2002<sup>854</sup> and sought to provide for a dedicated juvenile justice system in South Africa. In 2002 and 2003 the Bill was debated and thereafter it laid dormant until it was revived and revised in 2008 and later passed into law in 2009. The enactment of this law went parallel with the enactment of the Children's Act in 2005,<sup>855</sup> which provides for matters of child protection and social welfare.

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Incorporated in the New Children Statute in Tanzania,” in Mashamba, C.J. (ed.), *Using the Law to Protect Children's Rights in Tanzania: An Unfinished Business*. Dar es Salaam: National Organization for Legal Assistance, 2004; Research on Poverty Alleviation, “Delivery of Social Services on Mainland Tanzania: Are People Satisfied?” 34 *Afrobarometer Briefing Paper*. Dar es Salaam: April 2006; and Nkonya, C., “Anti-trafficking Problems in Tanzania: A Need for a Comprehensive Legislation,” Vol. 4 No. 4 *Justice Review*, March 2007.

<sup>852</sup> See for instance, Mashamba, C.J., “Basic Elements and Principles to be Incorporated in the New Children Statute in Tanzania”, *ibid.*; Legal and Human Rights Centre, *The State of Juvenile Justice*. Op. cit; and United Republic of Tanzania, “Report of Tanzania Law Reform Commission on the Law Relating to Children in Tanzania”, *ibid.*

<sup>853</sup> Child Justice Act, 75 of 2008.

<sup>854</sup> Child Justice Bill, 49 of 2002.

<sup>855</sup> Children's Act, 38 of 2005.

The Child Justice Bill was signed into law by former South African President, Kgalema Motlanthe on 11<sup>th</sup> May 2009<sup>856</sup>, after six years of debate and reworking. Speaking at the official launch of the Act in Soweto, Justice Minister Jeff Radebe said the legislation provides a criminal justice system specifically geared for children in conflict with the law. He said: ‘This is in recognition of the fact that the normal criminal justice system often fails to deal with the peculiar challenges facing children, such as their inability to understand the consequences of their actions.’<sup>857</sup> In an effort to both humanize the juvenile justice system and to protect the rights of children in conflict with the law, the new legislation raises the minimum age of child offenders and provides for several diversion options.

Like Ghana<sup>858</sup> and The Gambia,<sup>859</sup> South Africa decided to have a child justice-specific law separate from the general children’s rights protection law. This was a result of several reasons, of greatest relevancy being the existence of ‘a strong non-governmental organization (NGO) lobby for separate juvenile justice legislation which had commenced campaigning before the end of apartheid.’<sup>860</sup> This resulted in the appointment of a project committee of the South African Law Reform Commission ‘to investigate proposals for a new juvenile justice system shortly after the entry into force of the 1996 Constitution which ushered in a democratic government.’<sup>861</sup>

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<sup>856</sup> No. 75 of 2008: Child Justice Act, 2008.

<sup>857</sup> Available at <http://www.news24.com/SouthAfrica/News/Child-Justice-Act-launched-20100401> (accessed 11 January 2011).

<sup>858</sup> Sloth-Nielsen and Mezmur, op. cit, p. 334.

<sup>859</sup> Saine, M., “The New Law on Juvenile Justice in The Gambia.” *Article 40*. Vol. 7, 2005, p. 4.

<sup>860</sup> Sloth-Nielsen and Mezmur, op. cit.

<sup>861</sup> Ibid.

### 5.5.1 The Demand for a Child Justice Law Separate from the Children's Act

The law reform for a juvenile justice-specific law in South Africa was made possible in the constitutional context of South Africa as discussed in section 5.3.2. The clamour for the law was also an impact of South Africa's ratification of the CRC and ACRWC (discussed in section 5.3 above). In most African countries, South Africa inclusive, the ratification of these instruments has provided a climate for the re-examination of the law relating to children along the principles and standards laid down in these instruments.<sup>862</sup> As Odongo argues, the 'search for new comprehensive children's statutes began in South Africa before the ratification of the CRC in June 1995.'<sup>863</sup> This was because,

The early 1990s was marked by the clamour for a new South African juvenile justice system to be underpinned by new legislation. The process of juvenile justice law reform was formally started with the formation of South African Law Commission's Project on Juvenile Justice in 1996 ... led to the Child Justice Bill ... The Bill [sought] to provide for a dedicated juvenile justice system in South Africa. Further to this, a new Children's Bill dealing with matters of child social welfare has now been passed by the National Assembly.<sup>864</sup>

In fact, this clamour was hatched in the apartheid era in that country. As Amanda Dissel points out, apartheid resulted in 'poverty, social exclusion, and deprivation for the majority of the black population.'<sup>865</sup> Even after the successful negotiated transition to democracy in 1994, South Africa 'continues to experience disparities in wealth, income, and opportunity.'<sup>866</sup> This was coupled with the increasingly high rate of crime, particularly those committed by children and young people, contrary to early expectations that after the entrenchment of democracy crime rate would

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<sup>862</sup> Sloth-Nielsen and Mezmur, op. cit. Pp. 332-8. See also Odongo, op. cit, pp. 77-8; and Sloth-Nielsen, J. and B. Van Heerden, "New Child Care and Protection Legislation for South Africa? Lessons from Africa." *Stellenbosch Law Review*. Vol. 3, 1997, p. 266.

<sup>863</sup> Odongo, *ibid*, p. 78.

<sup>864</sup> *Ibid*.

<sup>865</sup> Dissel, A., "Youth, Crime and Criminal Justice in South Africa." *World Bank Legal Review: Law, Equity, and Development*. Vol. 2, 2006, pp. 235-261, p. 236.

<sup>866</sup> *Ibid*.

decrease.<sup>867</sup> The effect of the increasing disparities in wealth and income in South Africa has ramifications on the nature of what Jock Young describes as a ‘vital ingredient in the criminogenic cocktail of late modern society.’<sup>868</sup> This was evidenced in a survey of 63 countries around the world, which found that South Africa’s high crime rate was a result of, *inter alia*, the existing greater and worst income gap and inequality in the country. Amongst the countries surveyed, South Africa had the worst income inequality and the highest homicide rates.<sup>869</sup>

In another survey that analysed crime and welfare data across all police precincts in South Africa, Demombynes and Ozler found that inequality around and within a given area were highly correlated to property crime, demonstrating that the returns to crime (i.e. the financial benefit to the criminal) were a major determinant factor of this type of crime. They also found that violent crimes were more likely to occur where there was a high degree of inequality within and around an area; whereby property offences – such murder and burglary – revealed a positive considerable connection between unemployment and crime. This was also the case with racial heterogeneity in an area, which correlated with all kinds of crimes.<sup>870</sup>

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<sup>867</sup> South African Police Service (Department of Safety and Security), “Crime Statistics, 2004-2005.” South African Police Service, Pretoria, South Africa, 2004.

<sup>868</sup> Young, J., *The Exclusive Society*. London: Save the Children, 1999. See also Dissel, op. cit, p. 337; and Dixon, B., “Exclusive Society: Towards a Critical Criminology of Post-apartheid South Africa.” *Society in Transition: Journal of the Sociological Association*. Vol. 32 No. 2, 2001, p. 8.

<sup>869</sup> Wood, A., “Correlating Violence and Socio-Economic Inequality: An Empirical Analysis.” In World Organisation against Torture, *Poverty, Inequality, Violence: Is There a Human Rights Response? Collection of Papers Presented at the Geneva International Conference*. Geneva: World Organisation against Torture, 2004, p. 21.

<sup>870</sup> Demombynes, G. and B. Ozler, “Crime and Inequality in South Africa.” *Journal for Development Economics*. Vol. 76 No. 2, 2005, p. 287.

Set in this background, wealth and income inequality in South Africa have been on the increase, despite South Africa being among the 50 wealthiest nations in the world,<sup>871</sup> sparking unprecedented crime rates, particularly amongst juveniles and the youth. In this regard, children and young people are the most affected by poverty and marginalization; ‘and their experiences of social exclusion may contribute to risk drivers for crime.’<sup>872</sup>

The harsh consequences of apartheid in South Africa towards the 1990s had specific relevance to juvenile justice, characterised by ‘the high rate of imprisoned children who in the days of apartheid were mostly political detainees and were subject to arbitrary arrests, detention without trial and sometimes torture.’<sup>873</sup> So,

During the 1980s the struggle in opposition to apartheid had extended the spotlight on politically detained children with calls for their release.<sup>874</sup> The problem of pre-trial detention was earmarked for particular attention in light of the burgeoning number of children, at the time, mostly detained in prisons and police cells without trial. With the move towards democratic rule from the early 1990s, this focus slowly disappeared and the campaign broadened to cover the general situation of children in conflict with the law.<sup>875</sup>

To address these problems, a number of pieces of legislation were enacted in the transition from apartheid to democracy, culminating particularly in the adoption of the Constitution of South Africa in 1996 and later the Child Justice Act in 2008. This

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<sup>871</sup> Dissel, op. cit, p. 238.

<sup>872</sup> Ibid.

<sup>873</sup> Odongo, op. cit, p. 103. See also Mosikatsana, T.L., “Children’s Rights and Family Autonomy in the South African Context: A Comment on Children’s Rights under the Final Constitution.” *Michigan Journal on Race and the Law*. Vol.3, 1998, p. 341 cited in Sloth-Nielsen, J., “The Juvenile Justice Law Reform Process in South Africa: Can a Children’s Rights Approach Carry the Day?” *Quinnipiac Law Review*. Vol. 18 No. 3, 1999, p. 469.

<sup>874</sup> In reference to the role of children in the struggle against apartheid, see Wilson, F. and M. Ramphele, “Children in South Africa.” In United Nations Children’s Fund, *Children on the Frontline: The Impact of Apartheid, Destabilization and Warfare on Children in Southern and South Africa*. New York: UNICEF, 1987.

<sup>875</sup> Odongo. Op. cit, pp. 103-4.



was contributed to the presence of a strong NGO lobby in South Africa.<sup>876</sup> In the main,

The thrust of these campaigns was mainly fixed on the release of children from prisons and police custody - a feature that led to a number of legislative enactments aimed at limiting pre-trial detention of children.<sup>877</sup> The commitment to address pre-trial detention would later prove to be a dominant theme in the South African juvenile justice law reform process.<sup>878</sup>

As already discussed above, this NGO lobby campaigned in the form of calling for a separate juvenile justice law throughout the 1990s and early 2000s, through numerous conferences and seminars – of significant relevance to the campaign for new legislation being the 1993 “International Seminar on Children in Trouble with the Law”.<sup>879</sup>

### **5.5.2 The Consultative Process for the Enactment of the Child Justice Act**

The consultative process for the reform of the laws relating to juvenile justice in South Africa was highly coordinated by a Project Committee on Juvenile Justice, which was appointed by the Minister of Justice in December 1996 ‘to come up with recommendations for a dedicated child justice statute for South Africa.’<sup>880</sup> Appointed and working under the auspices of the then South African Law Commission (SALC)

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<sup>876</sup> Skelton, A., “The South African Child Justice Bill: Transition as an Opportunity”. In Jensen, E. and J. Jepsen (eds.), *Comparative Juvenile Justice*. Copenhagen: Danish Institute of Human Rights, 2004.

<sup>877</sup> The most prominent of these was the Correctional Services Amendment Act (No. 17 of 1994) that was formulated to halt the then largely rampant practice of detaining children in adult prisons pending trial. The enactment was later to prove unsuccessful thanks to ambivalence on the part of different role players in government and the lack of proper provisioning.

<sup>878</sup> Odongo, op. cit, p. 105.

<sup>879</sup> The Conference was organised by Community Law Centre, University of the Western Cape and attended by a number of individuals concerned with juvenile justice including government representatives. See Community Law Centre, *Report on the International Seminar on Children in Trouble with the Law*. Bellville, Community Law Centre, 1993, pp. 8-9. Cited in Odongo, op. cit, p. 105.

<sup>880</sup> Odongo, *ibid*, p. 7.

(now known as South Africa Law Reform Commission, SALRC)<sup>881</sup>, the committee comprised of six members ‘drawn from civil society and government and was assisted by a secretary and a consultant to the SALC.’<sup>882</sup> These members had different backgrounds in terms of their fields of expertise drawing from law, social work and sociology.’<sup>883</sup>

The Committee adopted a “highly consultative process”,<sup>884</sup> effectively involving and engaging CSOs, which was necessitated by the fact that the Minister had appointed individuals from civil society ‘whom he knew had been part of the NGO lobby group calling for substantial reform to the juvenile justice system.’<sup>885</sup> In contrast, the reform of juvenile justice laws in Tanzania, which was made in a composite approach with the reform of other child-related laws in 2009,<sup>886</sup> did not involve any such NGOs and it was made a secret until the Bill to Enact the Law of the Child was

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<sup>881</sup> This is a statutory body in charge of law reform in South Africa, in which case it oversees processes of law reform. The formation of the Juvenile Justice Committee to steer up the reform of juvenile justice legislation was ‘based on SALC’s practice of using such committees, comprising of members with expertise and knowledge on a particular field of proposed law reform.’ Ibid, p. 108.

<sup>882</sup> As Odongo points out: ‘It is of note that this membership was much smaller than that of the reform bodies in Kenya and Uganda. It is submitted however that irrespective of its relatively thin membership, any reservations regarding the multidisciplinary scope of the Committee’s work is dispelled in light of the highly consultative procedure it adopted ...’ See Odongo, *ibid* (note 144).

<sup>883</sup> Ibid.

<sup>884</sup> Kenya and Uganda also adopted similar consultative processes in enacting their composite children laws, which also contains substantive parts on juvenile justice. See particularly Odongo, *ibid*; Parry-Williams, J., “An Account of the Child Law Review Committee, Uganda 1989-1991: The Process and Considerations in Establishing the Committee and in Compiling its Proposals.” Unpublished MSc. Dissertation submitted to the University of Lancaster, 1991; Kenya Law Reform Commission, *A New Law on Children: Report of the Child Law Task Force*, 1993; and Odongo, G.O., “The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example.” *The International Journal on Children’s Rights*. Vol. 12 No. 4, 2004, pp. 419-430.

<sup>885</sup> Skelton, A., “The South African Child Justice Bill: Transition as an Opportunity”, *op. cit*, p 5.

<sup>886</sup> This reform resulted in the enactment of the Tanzanian Law of the Child Act in 2009.

published in the *Government Gazette* and introduced in Parliament for first reading in July 2009.<sup>887</sup>

The Committee in South Africa consulted members of the public at three stages. First, it released an *Issue Paper* for public debate in 1997,<sup>888</sup> proposing, for the first time, the enactment of a separate juvenile justice legislation. The release of the Issue Paper ‘was followed by a process of wide consultation with welfare, justice and prison officials and with individuals and organisations.’<sup>889</sup> In fact,

No less than 13 workshops and briefings were convened by the committee, which also advised the SALC to host a well-attended international drafting conference to discuss the feedback received. Extensive deliberations by the Committee on the views regarding the Issue Paper then ensued.<sup>890</sup>

In the second stage, SALC released a lengthy *Discussion Paper* in December 1998, drafted on the basis of consultations regarding the *Issue Paper*. As Odongo reflects, the *Discussion Paper* ‘contained a draft Bill and these two documents formed the basis for subsequent country-wide consultation in the course of 1999.’<sup>891</sup> This *Discussion Paper* was more comprehensive than the Issue Paper, ‘and in addition to including a draft Bill, it gave motivation and rationale for the content of the Bill besides reviewing existing law, available literature and foreign comparative law.’<sup>892</sup>

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<sup>887</sup> See particularly Mashamba, C.J. and K.L. Gamaya, ‘The Enactment of the Tanzanian Law of the Child Act (2009): Some Lessons Learnt from CSO Participation in the Lawmaking Process’, op. cit.

<sup>888</sup> South African Law Commission, *Juvenile Justice: Issue Paper on Juvenile Justice*, 1997.

<sup>889</sup> Odongo, op. cit, p. 109.

<sup>890</sup> Ibid.

<sup>891</sup> Ibid.

<sup>892</sup> Ibid, p. 110.

The release of the *Discussion Paper* was followed by the last stage of further consultation ‘with relevant government departments, NGO representatives and parliamentary portfolio committees through workshops.’<sup>893</sup>

Parallel to these consultations, the committee also consulted widely with children soliciting their views on the proposals developed.<sup>894</sup> To be able to get children’s views on the proposals, a consultant was commissioned and produced its report henceforth.<sup>895</sup> This mode was adopted from the Kenyan and Ugandan experiences, but the South African went further than the two examples by having a ‘specific objective of consulting children who had had experience with the juvenile justice system.’<sup>896</sup> Some scholars have described this consultation with children ‘as one of the striking examples of the eagerness with which South Africa has sought to follow the precepts of international best practice.’<sup>897</sup>

In the end, all views of the stakeholders so widely consulted were considered and incorporated in the SALC final report that informed the drafting of the Child Justice Act in South Africa.<sup>898</sup> The final report was scrutinized by the Directorate of

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<sup>893</sup> Ibid.

<sup>894</sup> For a documentation of the views of children, see particularly Community Law Centre, *What the Children Said: A Consultation with Children on the Draft Child Justice Bill (1998-9)*. Bellville: Community Law Centre (University of Western Cape), 1999.

<sup>895</sup> Kassan, D., “Participation by Children.” In Sloth-Nielsen, J. and J. Gallinetti, J (eds.), *Child Justice in Africa: A Guide to Good Practice*. Bellville: Community Law Centre (University of Western Cape), 2004, pp. 58-59.

<sup>896</sup> Odongo, op. cit, p. 110.

<sup>897</sup> Stout, B. and C. Wood, “Child Justice and Diversion: Will Children’s Rights Outlast the Transition.” In Dixon, E. and E. van der Spuy (eds.), *Justice Gained? Crime and Crime Control in South Africa’s Transition*. Cape Town: UCT Press, 2004, p. 117.

<sup>898</sup> South African Law Commission, *Juvenile Justice Report*. Pretoria: South African Law Commission, 2000. The Report was accompanied by a draft Child Justice Bill, with motivations behind each and every provision in the Bill. The final report of the Commission’s Committee on Juvenile Justice was handed to the Minister of Justice in August 2000.

Parliamentary and approved by Cabinet in November 2001. Thereafter, the Department of Justice redrafted it, giving raise to the Child Justice Bill of 2002.<sup>899</sup>

## **5.6 Legislative Action in Favour of Juvenile Justice in Tanzania**

This part examines the child law reform process in Tanzania, by particularly looking at the basis for the claim for a child law and the participation of stakeholders in this process.

### **5.6.1 The Need for a Comprehensive Child Law in Tanzania**

The need to have a comprehensive children's law was voiced even before the adoption of the CRC in 1989 and the ACRWC in 1990.<sup>900</sup> In 1986 the Law Reform Commission of Tanzania (LRCT)<sup>901</sup> informed the Minister responsible for Justice that 'it had established a working group to examine existing laws affecting children in Tanzania and provide recommendations for legislative revisions.'<sup>902</sup> In its final report on the review, which took four years to be completed, the LRCT acknowledged that 'there were already general indications and fears that the present law and practice relating to children's problems in various socio-economic circumstances had been over-taken by the ever-changing circumstances.'<sup>903</sup>

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<sup>899</sup> Child Justice Bill, No. 49 of 2002.

<sup>900</sup> Whereas the CRC was ratified by Parliament in 1991, the ACRWC was ratified in 2003.

<sup>901</sup> The LRCT was established under section of the Law Reform Commission of Tanzania Act, Cap. 171 R.E. 2002. According to section 4(1) of the Act, the LRCT mandate is 'to take and keep under review all the laws of the United Republic with a view to its systematic development and reform.'

<sup>902</sup> Tumbo-Masabo, Z. and V. Leach, "What Happened to the Children's Statute?" In Mamdani, M. et al (eds.), *Influencing Policy for Children in Tanzania: Lessons from Education, Legislation and Social Protection*. Dar es Salaam: Research on Poverty Alleviation, 2009, pp. 12-18, p. 12.

<sup>903</sup> Law Reform Commission of Tanzania, "Report of the Commission on the Law Relating to Children in Tanzania," submitted to the Minister for Justice and Constitutional Affairs, Dar es Salaam, April 1994, p. 4. Available at [http://www.commlnii.org/tz/TZLRC/report/R\\$4.pdf](http://www.commlnii.org/tz/TZLRC/report/R$4.pdf) (accessed 7 December 2009). This report is sometime called, "the Tenga Report" because the LRCT Working

Notably, the LRCT's working group, which undertook the review exercise, did a very comprehensive review, having visited and did a survey in at least 12 regions in the country. It also sent out questionnaires to courts, local authorities, ministries and key state institutions responsible for children's welfare. The team further visited Kenya and Zambia 'to study legislation in those countries, and reviewed the laws of the United Kingdom and New Zealand.'<sup>904</sup> Released at the time around which the CRC and the ACRWC were being adopted and implemented locally in various countries,<sup>905</sup> the review report recommended, *inter alia*, for total repeal and replacement of the laws affecting children's rights in Tanzania.<sup>906</sup>

Since the LRCT report was released in 1994, the Government of Tanzania (GoT) expressed its intention to amend laws relating to children. In 2000 the Ministry of Constitutional Affairs and Justice adopted the LRCT recommendations. However, since then government efforts to enact a single child law became slow and sometimes with no specific focus. As such, in 2002/2003 the National Network of Organizations Working with Children in Tanzania (NNOC), supported by Save the Children, widely discussed and collected opinions and proposals from all stakeholders including children and came out with a proposed child statute,<sup>907</sup> which was

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Group which produced the report was chaired by Dr. Ringo W. Tenga, an experienced advocate and law lecturer at the University of Dar es Salaam.

<sup>904</sup> Tumbo-Masabo, Z. and V. Leach, "What Happened to the Children's Statute?", op. cit.

<sup>905</sup> For a detailed account on this matter *see* particularly Sloth-Nielsen, J. and B.D. Mezmur, "Surveying the Research Landscape to Promote Children's Legal Rights in an African Context." *African Human Rights Law Journal*. Vol. 7 No. 2, 2007.

<sup>906</sup> Law Reform Commission of Tanzania, "Report of the Commission on the Law Relating to Children in Tanzania", op. cit.

<sup>907</sup> The position paper and CSO Alternative Child Bill was prepared by two legal experts namely Magnus Andersson and Clement Mashamba. Apart from being submitted to the Chief Parliamentary Draftsman (CPD) in May 2003, the CSO Alternative Child Bill was presented to the Parliamentary

presented to the government as well. Supporting the recommendations of the LRCT, NNOC also proposed for a comprehensive children law.<sup>908</sup>

### 5.6.2 The Basis for a Comprehensive Child Law

The basis for pressing for a comprehensive legislation to protect and promote children's statute is the fact that Tanzania ratified the CRC and ACRWC without any reservations, meaning that: 'Tanzania has undertaken to bring her domestic legislation in line with all the provisions of (these international instruments on the rights of the child).'<sup>909</sup>

Certainly, this is in accord with the recommendations of the UN Committee on the Rights of the Child (the CROC), which has, on regular occasions, been emphasizing that it is an essential aspect of States Parties thereto, while implementing the CRC, to ensure that all domestic legislation is "fully compatible" with the provisions and principles of the CRC.<sup>910</sup>

In respect of Tanzania, the CROC, in its *Concluding Observations* in respect of the country's initial report (1998) and the second periodic report (1998-2003), was concerned 'at the lack of a clear time frame (for Tanzania) to finalize the consultative

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Standing Committee (Community Development) on 28<sup>th</sup> April and 10<sup>th</sup> July 2009 by the National Organisation for legal Assistance (**nola**) on behalf of partner CSOs.

<sup>908</sup> See Andersson, M. and Mashamba, C.J., "Basic Elements and Principles to be Incorporated in a New Children Statute in Tanzania: A Requirements Paper to be Presented by NNOC to the Government Draftsman," Dar es Salaam: National Network of Organisations Working with Children in Tanzania, May 2003. See also Mashamba, C.J., "Basic Principles to be Incorporated in the New Children Statute in Tanzania." In Mashamba, C.J. (ed.), *Using the Law to Protect Children's Rights in Tanzania: An Unfinished Business*. Dar es Salaam: National Organization for Legal Assistance, 2004.

<sup>909</sup> Mashamba, C.J., "Basic Principles to be Incorporated in the New Children Statute in Tanzania", *ibid*, p. 107.

<sup>910</sup> *Ibid*.

process and enact “*The Children’s Act*.”<sup>911</sup> It should be noted that, in its second periodic report to the CROC (1998-2003), Tanzania reported that it was undertaking legislative review and collecting views of stakeholders, including children, through the national “White Paper.” It was reported that the National White Paper would engender the Children’s Act.<sup>912</sup> Nevertheless, the CROC urged Tanzania to ‘engage all efforts and resources necessary for the enactment of the Children’s Act in Tanzania Mainland and a similar Act in Zanzibar, as a matter of priority. It further [urged Tanzania] to ensure that all of its domestic and customary legislation [should] conform fully to the principles and provisions of the Convention, and ensure its effective implementation.’<sup>913</sup>

However, it was only in July 2009 when the GoT introduced in Parliament a Bill to enact the Law of the Child Act (2009),<sup>914</sup> which was read for the first time.<sup>915</sup>

According to the long citation of the Bill, this is,

An Act to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child; to provide for affiliation, foster care, adoption and custody of the

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<sup>911</sup> See CROC, “Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,” CRC/C/TZA/CO/2, dated 2<sup>nd</sup> June, 2006, para 9.

<sup>912</sup> See United Republic of Tanzania, “The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003,” Ministry of Community Development, Gender and Children; August, 2004. See also United Republic of Tanzania, “Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15<sup>th</sup>-19<sup>th</sup> May, 2006, in Geneva, Switzerland,” Ministry of Community Development, Gender and Children; April 2006.

<sup>913</sup> See CROC, “Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,” op. cit, para 10.

<sup>914</sup> The *Bill Supplement* in respect of this Bill was published in the *Gazette of the United Republic of Tanzania*, Vol. 90 No. 20, on 10<sup>th</sup> July 2009.

<sup>915</sup> The Bill to enact the *Law of the Child Act* (2009) was introduced in Parliament on 31<sup>st</sup> July 2009 under the auspices of Hon. Magreth Sitta (MP), Minister for Community Development, Gender and Children.



child; to further regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters.

The Act was assented to by President Jakaya Kikwete on 20<sup>th</sup> November 2009, which was the day when the world commemorated the 20<sup>th</sup> anniversary of the adoption of the CRC. This historical event provides a step forward towards fulfilment of Tanzania's obligations under international human rights law towards its children. The law is expected to create an environment to ensure maximum extent possible; the survival, protection and welfare of the child. This includes physical, mental, spiritual, moral, psychological and social development.

### **5.6.3 Lack of Stakeholders' Participation in the Child Law making in Tanzania**

Unlike in South Africa, the comprehensive child law in Tanzania was enacted without any significant participation of stakeholders. Surprisingly, the Bill to enact this Law was made public only 4 months before its passage in Parliament.<sup>916</sup> Gamaya and Mashamba point out that the demand for a child law in Tanzania started before the CRC and the ACRWC were adopted. There are several reasons why the law reform took a long period of time to be completed in Tanzania, despite constant pressures from different circles, including CSOs and the CROC. Amongst the reasons behind this prolonged process is the lack of political will on the part of the Government to enact the said law; and lack of coordinated lobby and pressure-groups

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<sup>916</sup> Whereas the Bill was published in the *Official Gazette of the United Republic of Tanzania* No. 28 Vol. 90 on 10<sup>th</sup> July 2009, the Law of the Child Act (2009) was passed in Parliament on 4<sup>th</sup> November 2009.

amongst the CSOs themselves in Tanzania.<sup>917</sup> In the next paragraphs, we shed light on the problems facing CSOs in participating in the child law-making process.

#### **5.6.3.1 Lack of Political Will to enact a Comprehensive Child Law in Tanzania**

On the part of the Government, it is disappointing to note that the law reform of the child laws in Tanzania took too long a time to be achieved as compared to other politically-motivated laws.<sup>918</sup> Indeed, it took the state some 23 years to reform the said laws since LRCT started to conduct an empirical study on these laws in 1986. Although the Commission presented its findings and recommendations to the Minister of Justice and Constitutional Affairs in April 1994,<sup>919</sup> it took the Government some other four years to act upon it when the then Deputy Attorney-General/Principal Secretary (Ministry of Justice and Constitutional Affairs), the Late Kulwa Sato Masaba, formed a Committee for Reviewing, *inter alia*, the Report of the Commission.

The Review Committee made its recommendations in 1998, proposing a number of proactive recommendations; seemingly, aiming at “overhauling” the entire children law regime so as to ground it onto internationally accepted children’s rights

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<sup>917</sup> Mashamba, C.J., “Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economics and Politics of Administration of Juvenile Justice – The Case of Tanzania.” In Sorensen, J.J. and Jepsen, J. (eds.), *Juvenile Justice in Transition: Bringing the Convention on the Rights of the Child to Work in Africa and Nepal*. Copenhagen: Danish Institute for Human Rights, 2005. See also Mashamba, C.J., “Realising Children’s Rights in the Context of the UDHR in Tanzania.” *The Justice Review*. Vol. 7 No. 1, 2009.

<sup>918</sup> For instance, a law aimed to control the conduct and perhaps the free existence of NGOs in Tanzania was passed within few months by Parliament, same as was the case with a law enacted to control and prevent terrorist activities in the country towards the end of 2002. These laws have political interests, which is why they were rushed through Parliament for “endorsement” at such a supersonic speed.

<sup>919</sup> Law Reform Commission of Tanzania, “Report on the Law Relating to Children in Tanzania”, op. cit.

principles.<sup>920</sup> This delay creates a feeling to members of CSO that the Tanzanian Government accords more attention to corporate matters than laws that affect the welfare of its citizen.

At this stage, the Government in November 2001 decided to convene a consultative meeting to consider and provide inputs on three reports – that is, relating to inheritance, children and marriage matters. This meeting which brought together academics, women’s and children’s rights activists, lawyers, social workers and governmental officials, was organised by the then Ministry of Justice and Constitutional Affairs (MoJCA)<sup>921</sup> in collaboration with the then Ministry of Community Development, Women and Children (MCDWC).<sup>922</sup> The consultative meeting actually agreed with the LRCT recommendations regarding the need to have a comprehensive child statute.<sup>923</sup> When the report of the consultative meeting, popularly known as the “Makaramba Report,”<sup>924</sup> was submitted to the MoJCA it was ‘decided that a cabinet paper should be prepared to allow for cabinet’s review of the

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<sup>920</sup> See particularly Makaramba, R.V., “Report of the Proposals of the Meeting to Review Reports of the Law Reform Commission on the Law Related to Children and the Findings of the Review Committee,” submitted to the Ministry of Justice and Constitutional Affairs, Dar es Salaam, 2001; Mashamba, C.J., “Emerging Issues in Diverting Juvenile Offenders from the Criminal Justice System: The Socio-Cultural Realities, Economics and Politics of Administration of Juvenile Justice – The Case of Tanzania”, op. cit; Tumbo-Masabo, Z. and V. Leach, “What Happened to the Children’s Statute?”, op. cit; and Mashamba, C.J., “Realising Children’s Rights in the Context of the UDHR in Tanzania”, op. cit.

<sup>921</sup> The name of the ministry has been changed to Ministry of Constitutional and legal Affairs (MoCLA).

<sup>922</sup> The name of the ministry has been changed to Ministry of Community Development, Gender and Children (MCDGC).

<sup>923</sup> Makaramba, op. cit.

<sup>924</sup> Hon. Justice Robert Vincent Makaramba, who now serves as a High Court Judge, was the main facilitator of this meeting, which was held at then TANESCO Training Institute in Morogoro on 17<sup>th</sup> to 21<sup>st</sup> November 2001.

recommendations before legislation was prepared for consideration by the National Assembly.’<sup>925</sup>

In June 2002, the Department of Social Welfare (DSW) convened a two-day workshop in Morogoro to review laws related to child rights in Tanzania. Specifically, the workshop aimed at gathering views and opinions from stakeholders about laws related to child rights; identifying gaps inherent in the existing laws; identifying challenges posed by different laws relating to child rights; and recommending amendments to the said laws. Again, the workshop was basically in agreement with the LRCT recommendations.

However, the Government did not do anything, prompting the exasperation of the CROC, which, in its *Concluding Observations* in respect of the country’s initial report (1998) and the second periodic report (1998-2003), was concerned ‘at the lack of a clear time frame (for Tanzania) to finalize the consultative process and enact the Children’s Act.’<sup>926</sup>

It should be noted that, in its second periodic report to the CROC (1998-2003), Tanzania reported that it was undertaking legislative review and collecting views of stakeholders, including children, through the national “White Paper.” It was reported

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<sup>925</sup> Tumbo-Masabo, Z. and V. Leach, “What Happened to the Children’s Statute?”, op. cit, p. 14.

<sup>926</sup> See CROC, “Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,” CRC/C/TZA/CO/2, dated 2<sup>nd</sup> June, 2006, para 9.

that the National White Paper would engender the Children's Act.<sup>927</sup> Nevertheless, the CROC urged Tanzania to expedite the lawmaking process.

Considering Tanzania's Initial Report to submitted in 2009, the ACERWC urged Tanzania 'to work on the Concluding Observations made by the UN Committee on the Rights of the Child aimed at improving the state of juvenile justice in its jurisdiction, by particularly enacting comprehensive provisions in the juvenile justice standards; allocating sufficient human and physical resources; and conduct regular training to juvenile justice personnel to ensure that juvenile justice is administered in consonance with best practices and international standards.'<sup>928</sup>

In a very interesting turn of events, in 2008 while presenting his ministry's 2008/09 budgetary speech in the National Assembly, the Minister for Constitutional Affairs and Justice, Hon. Mathias Chikawe, said the Government had no intention of enacting a single, comprehensive child law. Instead, the Government intended to make amendments to *all* laws affecting or touching on children's rights. However, in his 2009/10 budgetary speech delivered in the same august house on 30<sup>th</sup> June 2009, Hon. Chikawe said that the Government had already prepared a Bill on children's rights to be tabled in Parliament at the end of the June-July 2009/2010 Budgetary

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<sup>927</sup> See United Republic of Tanzania, "The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003," Ministry of Community Development, Gender and Children; August, 2004. See also United Republic of Tanzania, "Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15<sup>th</sup>-19<sup>th</sup> May, 2006, in Geneva, Switzerland," Ministry of Community Development, Gender and Children; April 2006.

<sup>928</sup> ACERWC, "Concluding Recommendations on the Republic of Tanzania Report on the Status and Implementation of the African Charter on the Rights and Welfare of the Child", 2010, p. 9.

Session.<sup>929</sup> This promise was supported by Hon. Margareth Sitta (Minister for Community Development, Gender and Children) when she addressed a stakeholders' consultative meeting held in Dar es Salaam in June 2009.<sup>930</sup> Eventually, the Law of the Child Act (2009) was at last passed by Parliament on 4<sup>th</sup> November 2009.

This turn of events on the part of the top government officials responsible for the children's law reform only left a lot of unanswered questions. Was the Government really committed to see to it that the child law is effectively implemented? Were these conflicting statements meant to delay the process or show some measure of honouring the Government's promise to enact the law, which had been repeatedly made since November 2001 when the then Minister for Community Development, Women and Children made the first promise to that effect.<sup>931</sup> Besides, the way different ministries or government departments have been dealing with this matter shows lack of coordination of children's issues on the part of the Government,<sup>932</sup>

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<sup>929</sup> See Mashamba, C.J., "Accepting the Necessary Evil: The Need for a New Statute for Promoting and Protecting Children's Rights in Tanzania", op. cit.

<sup>930</sup> The Minister was the guest of honour at a two-day Stakeholders' Consultative Workshop to Explore the Rationale and Need to Establish a Children's Legal Protection Centre, organised by the African Child Policy Forum and held at the Peacock Millennium Towers Hotel in Dar es Salaam, on 22<sup>nd</sup> and 23<sup>rd</sup> June 2009.

<sup>931</sup> This researcher was present at a meeting held at the then TANESCO Training Centre, Morogoro, in November 2001, when the then Minister for Community Development, Women and Children promised participants that the Government would table, *inter alia*, the *Children's Bill* in Parliament in February 2002, which never happened. This was a stakeholders' consultative meeting that was organised by the Ministry of Justice and Constitutional Affairs in collaboration with the Ministry of Community Development, Women and Children to discuss Government recommendations made on three reports submitted by the Law Reform Commission of Tanzania in April 1994 on laws relating to marriage, inheritance and children.

<sup>932</sup> In its recent Concluding Observations, the UN Committee on the Rights of the Child has raised an eye blow as to which state institution is responsible for coordination issues concerning children in the entire United Republic of Tanzania. See particularly United Republic of Tanzania, "The Country Second Periodic Report on the Implementation of the Convention on the Rights of the Child (CRC): 1998-2003," Ministry of Community Development, Gender and Children; August, 2004; and United Republic of Tanzania, "Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second

which is one of the reasons for delaying the legislative process; and might impede the implementation process of the new law.

In contrast, it took the Ugandan Government only six years to enact a new child law<sup>933</sup> after the coming into force of the CRC. On the other hand, the South African Government finalized the enactment of the Children's Act<sup>934</sup> in 2005<sup>935</sup> and having enacted a provision in its 1996 Constitution<sup>936</sup> that protects children's rights.

### 5.6.3.2 Some Religious Considerations

Yet there are also other factors that affected the pace of the Government in the lawmaking process. This include the fact that, although all the reviews and workshops discussed above supported the need to have a single, comprehensive child law, there was in the offing resistance from some social circles, like religious groups,

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CRC Report during the UN CRC Committee Session on 15<sup>th</sup>-19<sup>th</sup> May, 2006, in Geneva, Switzerland," Ministry of Community Development, Gender and Children; April 2006.

<sup>933</sup> Ugandan Children Statute (1996).

<sup>934</sup> Parliament passed the Children's Amendment Bill on 22 November 2007. The President signed it into law on 13 March 2008, and its official name and number is the Children's Amendment Act (No. 41 of 2007). It amends and completes the *Children's Act* (No. 38 of 2005), which was passed by Parliament on 14 December 2005 and signed into law by the President in June 2006. On 29 June 2007, the President published a proclamation in the Government Gazette for the commencement of certain sections of the Children's Act on 1 July 2007. Available at <http://www.ci.or.za/frames.asp?section=lawreform> (accessed 7 September 2011). The full text of the South African Children's Act can be accessed at <http://www.ci.org.za/deps/ci/plr/bills/ChildrensAct38-2005.pdf>.

<sup>935</sup> South Africa ratified the CRC in 1995 'and subsequently adopted the 1996 South African Constitution, which includes a special provision' guaranteeing the rights of the child. *See* particularly *ESR Review*, Vol. 4, No. 2, 2003; Sloth-Nielsen, J. and B.D. Mezmur, "Surveying the Research Landscape to Promote Children's Legal Rights in an African Context", *op. cit.*, pp. 330-353; Jonas, B., "Towards Effective Implementation of Children's Rights in Tanzania: Lessons and Opportunities from Ghana and South Africa," LL.M. Thesis, University of Pretoria, 2006; and Saine, M., "Protecting the Rights of Children in Trouble with the Law: A Case Study of South Africa and The Gambia," University of Pretoria, 2005.

<sup>936</sup> Section 28 of the South African Constitution (1996).

about consolidating issues of marriage and inheritance into a single child law.

Indeed,

The social sensitivity of legislating what are customarily viewed as domestic concerns was clearly a concern among senior officials in Government, and this was the explanation for the decision to hold another round of public consultations in a white paper process after the Government considered the reports of the Law Reform Commission and the review committee.<sup>937</sup>

This, in effect, delayed the process; and, consequently, resulted in leaving out issues relating to child marriage and inheritance in the LCA.

#### **5.6.3.3 Lack of Coordinated Lobby amongst the Child Rights Stakeholders in Tanzania**

On their part, child rights stakeholders (including CSOs) were not vocal on the issue of not only having a child rights law but a juvenile justice one: because of lack of focused coordination amongst themselves, lack of resources (both financial and human) and their incapacity to push their advocacy agenda through the opaque government bureaucracy. For instance, NGOs have been looking for ways to participate in the preliminaries on the preparation of the Bill to no avail. The Bill was seen for the first time when the Government gazetted it on 10<sup>th</sup> July 2009. This is contrary to what was done in South Africa towards the enactment of that country's children's laws: i.e., the Children's Act and the Child Justice Act. As Lois Law opines, 'it must be acknowledged that there was an extensive process of consultation with other national departments including Justice, Education, Health, Labour, Safety

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<sup>937</sup> Tumbo-Masabo, Z. and V. Leach, "What Happened to the Children's Statute?" Op. cit, p. 17.



and Security, the provinces, non-governmental organisations and service providers.<sup>938</sup>

The question of coordination has, in fact, haunted Tanzanian CSOs in the advocacy for a child statute. There has been lack of a strong CSO movement advocating for prompt enactment of the law, as was exhibited by women's rights activists in the eve of the enactment of the most celebrated Sexual Offences (Special Provisions) Act (1998), popularly known as the SOSPA. The enactment of the SOSPA was greatly achieved due to strong coordination of championed by the pulsating stakeholders Tanzania Media Women Association (TAMWA). In fact,

This example of sustained civil society pressure to bring about policy and legislative change has strong but limited lessons for children's rights in Tanzania. The principal limitation is that a statute for children's rights is not a single specific issue which would be universally agreed to resolve egregious wrong, even if the provisions of such a statute would go a long way towards protecting children and correcting abuse of children's rights. The main lesson is that the strong coordination and resolve which brought about SOSPA seems to be sorely lacking on behalf of children, both within Government and among organisations of civil society.<sup>939</sup>

Nonetheless, one of the more strategic and effective civil society labyrinth was recently championed by **nola** in the pre-enactment period. **nola** provided both technical and *some* financial resources<sup>940</sup> from its stretched coffers under the Strategic Plan (2008-2012). **nola** had also collaborated with the now *dormant* National Network of Organisations Working with Children in Tanzania (NNOC) to

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<sup>938</sup> Law, L., "The Children's Act," *Briefing Paper* 153 (Southern African Catholic Bishops' Conference, Parliamentary Liaison Office), February 2006. See also Davel, C.J. and A.M. Skelton (eds.), *Commentary on the Children's Act*. Pretoria: JUTA Publishers, 2006.

<sup>939</sup> Tumbo-Masabo, Z. and V. Leach, "What Happened to the Children's Statute?", op. cit, p. 18.

<sup>940</sup> At some point, UNICEF and Save the Children supported the Taskforce, to which **nola** was a member, particularly regarding the convening of a stakeholders' consultative meeting held in Dar es Salaam on 24<sup>th</sup> and 25<sup>th</sup> September 2009. UNICEF also supported the Coordinator and some of the coordination activities at the last moment leading to the submission of the position paper in October and November 2009.

gather and collate opinion from CSOs. Apart from holding several nationwide stakeholders' opinion gathering meetings, NNOC members had gone as far as to commission two child rights experts to prepare a position paper as well as an alternative draft Bill of what principles should the new law contain. The documents were submitted to the Chief Parliamentary Draftsman (CPD) for consideration and incorporation (if relevant) into the Bill to be tabled in the Legislature. The two experts were Clement Mashamba (Advocate, Tanzanian) and Magnus Andersson (a Swedish lawyer then working in Tanzania).

There was also another local NGO, namely the National Organization for Children Welfare and Human Relief (NOCHU). NOCHU, working on its own right, went around the country to collect and later collated the views of different stakeholders. On 28<sup>th</sup> April 2009 and 10<sup>th</sup> July 2009 the National Organisation for Legal Assistance (**nola**), on behalf of NNOC, presented the CSO Alternative Child Bill to the Parliamentary Standing Committee (Community Development) in Dodoma. The Committee welcomed the Bill and agreed to work in close collaboration with CSOs to see to it that the Government finalised the enactment of a comprehensive child law. On 7<sup>th</sup> and 8<sup>th</sup> October 2009 **nola** led its partner in presenting the CSOs views at a public hearing on the Bill to enact the Law of the Child Act (2009), which was organised by the Parliamentary Standing Committee on Community Development. **nola** also did the same thing on 28<sup>th</sup> October 2009 in Dodoma at a meeting involving members of the media, CSOs, line ministries and MPs.<sup>941</sup> Again, on 3<sup>rd</sup> November

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<sup>941</sup> This meeting was organized by the Ministry of Community Development, Gender and Children.

2009, **nola** and partner CSOs made a final round of lobbying with MPs in the Pius Msekwa Hall at the Bunge premises.

### **5.7 Conclusion**

Both the CRC and the ACRWC require States Parties thereto to undertake measures – legislative, policy, administrative and programmatic – to ensure that all rights and freedoms set out in these instruments are realised. In to comply with this obligation, both South Africa and Tanzania have constitutionalised human rights, particularly so children’s rights in the South African Constitution, which provide a range of protection to children’s rights, including those in conflict with the law. To make these constitutional guarantees more effective, both South Africa and Tanzania have enacted specific laws for the protection of rights of children in conflict with the law. The enactment of these laws was a result of the ever increasing global shift towards legislative measures taken by many contemporary states aimed at statutory domestication of children’s rights.

In enacting these laws both countries undertook certain processes that were more or less consultative in nature. This Chapter has, therefore, examined the constitutional guarantee of the rights of children in conflict with the law and the paths followed by both South African and Tanzania in enacting the laws relating to the rights of children in conflict with the law.

## CHAPTER SIX

### 6.0 DOMESTICATION OF INTERNATIONAL JUVENILE JUSTICE STANDARDS IN SOUTH AFRICA: AN EXAMINATION OF THE LAW AND PRACTICE

#### 6.1 Introduction

In Chapter Four we observed that it is a well-established principle in international human rights law obliging states to domesticate human rights standards enshrined in a given international human rights instrument into their respective jurisdictions. It should be noted that this requirement is also embedded in Article 26 of the Vienna Convention of the Law of Treaties<sup>942</sup>, which establishes the principle of *pancta sunt servanda*, stating that: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ Both the CRC and the ACRWC oblige States Parties thereto, *inter alia*, to domesticate international child rights standards, particularly those relating to children in conflict with the law. Such domestication is basically achieved through legislative efforts undertaken by States Parties thereto to give legal effect to the said instruments. In compliance with this requirement, South Africa has enacted the Child Justice Act (henceforth, the CJA) for the protection of children in conflict with the law as well as for the administration of juvenile justice system to domesticate international juvenile justice standards.

This Chapter, therefore, examines the extent to which South Africa has domesticated international juvenile justice standards in the CJA. The Chapter begins by highlighting South Africa’s recognition of international juvenile justice standards and

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<sup>942</sup> Done at Vienna on 23 May 1969, the Vienna Convention on the Law of Treaties entered into force on 27 January 1980; and its text is published in United Nations, *Treaty Series*, vol. 1155, 2005, p. 331.

the supremacy of the Constitution in the administration of juvenile justice in that country. The Chapter then proceeds to examine the objectives of, and the guiding principles underlying, the CJA. It also examines the salient features of the CJA, which include the minimum age of criminal responsibility (MACR); methods of securing attendance of offending children in courts; release and detention or placement of children in conflict with the law; assessment of offending children; diversion and sentencing of children found to have offended penal law. In the end, the Chapter examines the provisions in the CJA relating to parliamentary oversight of the implementation of the juvenile justice law.

## **6.2 Recognition of International Juvenile Justice Norms and the Supremacy of the Constitution**

The CJA, which has introduced a “new” and comprehensive system for dealing with child offenders<sup>943</sup>, is one of the progressive child justice laws recently enacted in contemporary Africa as it recognises principles of international child rights law. It also recognises the supremacy of the Constitution of South Africa on human rights generally and child justice in particular. The recognition of the supremacy of the Constitution of South Africa is set in clear terms in the Preamble to the CJA, which recognises it as the supreme law of the country adopted ‘to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life of all its people and to free the potential of every person by all means possible.’ In respect of children in conflict with the law, the Preamble is clear in its elaboration thus: ‘the Constitution, while envisaging the

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<sup>943</sup> Courtenay, R.M., “S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae).” *Article 40*. Vol. 14 No. 1, April 2012.

limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards.’

In clear terms, the long title of the CJA is emphatic on this assertion as it seeks to ‘establish a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic [of South Africa].’ It further states that the CJA seeks ‘to provide for the minimum age of criminal capacity of children’; as well as ‘to provide a mechanism for dealing with children who lack criminal capacity outside the criminal justice system’. The latter is very crucial because in many jurisdictions around the world the question of children who commit offences but are out of the age group canvassed by the criminal capacity is often left out. This usually results in a number of abuses of such children.

The CJA also seeks ‘to make special provision for securing attendance at court and the release or detention and placement of children’; and ‘to make provision for the assessment of children’. It also seeks to make provision for child justice courts to hear all trials of children whose matters are not diverted; to extend the sentencing options available in respect of children who have been convicted; and to entrench the notion of restorative justice in the criminal justice system in respect of children who are in conflict with the law.

In principle, the CJA is set in the background which recognizes that: ‘before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law’. Thus, this background necessitated the enactment of this law.

### 6.3 Objectives of the Child Justice Act

The objectives clause of the CJA focuses on the promotion of the spirit of *Ubuntu*<sup>944</sup> in the child justice system through fostering children’s sense of dignity and worth and reinforcing children’s respect for human rights of others. *Ubuntu*, as a significant factor in African community solidarity on survival and justice issues, was better judiciously defined in *S v Makwanyane*<sup>945</sup> by the South African Constitutional Court as:

[A]culture which places some emphasis on communality and on the interdependence of the members of a community. It recognizes a person’s status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of. It also entails the converse, however. The person has a corresponding duty to give the same respect, dignity, value and acceptance to each member of that community. More importantly, it regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.<sup>946</sup>

*Ubuntu*, as an important African communal ethic, was also given judicial consideration by the Court of Appeal of Tanzania in *DPP v Daudi Pete*.<sup>947</sup> In this

<sup>944</sup> This *Bantu* word is also explained in some *Bantu* vernaculars as *Umuntu*, *ubunhu*, *ngumuntu*, *botho*, *ngabantu*, etc.

<sup>945</sup> 1995 (3) SA 391 (CC). For a detailed analysis of the import and dimensions of *Ubuntu*, see particularly Rwezaura, B., “Competing ‘Images’ of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa.” *International Journal of Law, Policy and the Family*. Vol 12, 1998, pp. 253-278; and Julia, Sloth-Nielsen and J. Gallinetti, “Just Say Sorry?” *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008.” *P.E.R.* Vol. 14 No. 4, 2011.

<sup>946</sup> *S v Makwanyane*, *ibid*, para. 224.

<sup>947</sup> [1993] TLR 22 (CA).

case, the Court considered the African communal ethic to be ‘the co-existence of the individual and society, and also the reality of co-existence of rights and duties of the individual on the one hand, and the collective of communitarian rights and duties of society on the [which in effect] means that the rights and duties of the individual are limited by the rights and duties of society, and vice versa.’

In the view of Mokgoro, *Ubuntu* is a key social value which emphasises ‘group solidarity, conformity, compassion, respect, human dignity, humanistic orientation and collective unity.’<sup>948</sup> Connecting *Ubuntu* and the concept of extended family in Africa, Mokgoro points out that: ‘a society based on *Ubuntu* places strong emphasis on family obligations. Although the concept of *Ubuntu* has proved difficult to define in the Western language<sup>949</sup>, in South Africa it is viewed as the basic constitutional value of human dignity; it is an idea based on deep respect for the human dignity of others.’<sup>950</sup> Concretizing the essence of *Ubuntu* in the African justice system, Sachs, J., held in *Dikoko v Mokhatla* that: ‘*Ubuntu – botho* is more than a phrase to be invoked from time to time to add a gracious and affirmative gloss to a legal finding already arrived at. It is intrinsic to and constitutive of our constitutional culture’.<sup>951</sup> In *Port Elizabeth Municipality v Various Occupiers*<sup>952</sup>, Justice Sachs of the South African Constitutional Court, J., held that the spirit of *Ubuntu*, as part of the deep

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<sup>948</sup> Mokgoro, Y.J., “Ubuntu and the Law in South Africa.” *Buffalo Human Rights Law Review*. Vol. 4, 1998.

<sup>949</sup> See, for instance, Keevy, I “*Ubuntu* versus the Core Value of the South African Constitution.” *Journal for Juridical Science*. Vol. 32, 2009; and Julia, Sloth-Nielsen and J. Gallinetti, “Just Say Sorry?” *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008”, op. cit, p. 69.

<sup>950</sup> See particularly Mokgoro in *Dikoko v Mokhatla* 2006 6 SA 235 (CC), para 68 (*per* Mokgoro, J.).

<sup>951</sup> *Ibid*, para 113.

<sup>952</sup> 2005 (1) SA 217 (CC). This case was dealing with the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 19 of 1998.



cultural heritage of the majority of the population in Africa, ‘suffuses the whole constitutional order.’ According to Justice Sachs, *Ubuntu* ‘combines individual rights with a communitarian philosophy. It is a unifying motif of the Bill of Rights, which is nothing if not a structured, institutionalized and operational declaration in our evolving new society of the need for human interdependence, respect and concern.’<sup>953</sup> He suggests, therefore, that courts should be ‘called upon to balance competing interests in a principled way and promote the constitutional vision of a caring society based on good neighbourliness and shared concern.’

In terms of section 2(b) of the CJA, the promotion of the spirit of *ubuntu* in the child justice system is carried out through; first, fostering children’s sense of dignity and worth. Second, reinforcing children’s respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safeguarding the interests of victims and the community.<sup>954</sup> Third, supporting reconciliation by means of a restorative justice response. Fourth, involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of the CJA in order to encourage the reintegration of children.

Furthermore, the CJA aims at providing for ‘the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and

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<sup>953</sup> Ibid, para 37.

<sup>954</sup> Badenhorst, C., “Launch and Implementation of the Child Justice Act.” *Article 40*. Vol. 12 No. 1, October 2010.

productive adults.’<sup>955</sup> It also aims at preventing children ‘from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion.’<sup>956</sup> Finally, the CJA aims at promoting ‘co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of the CJA.’<sup>957</sup>

Julia Sloth-Nielsen and Jack Gallinetti extrapolate several main characteristics underlying the provisions of Section 2 in relation to the introduction of the concept of *Ubuntu* in the CJA.<sup>958</sup> They first argue that the theory of *Ubuntu* is characterised by ‘an understanding of the rootedness of child offenders in their families and communities (the expressions *umuntu*, *ngumuntu*, *ngabantu* are apposite).’ According to them, any resolution to the matter or outcome of the offence ‘must therefore take the child’s family and community context into account.’ They further argue that another way of looking at this issue relates to the communitarianism which is said to differentiate *Ubuntu* and African philosophy from Western thought. Thus, Sections 2(b)(ii) and (iii) are probably indicative of this dimension. It is

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<sup>955</sup> Section 2(c) of the CJA.

<sup>956</sup> Ibid. Section 2(d).

<sup>957</sup> Ibid. Section 2(e).

<sup>958</sup> Julia, Sloth-Nielsen and J. Gallinetti, “Just Say Sorry?” *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008”, op. cit, pp. 70-3.

apparent, more clearly, in Section 2(b)(iv), which reinforces the notion that one's personhood depends on one's relationship with others.<sup>959</sup>

The second characteristic underlying Section 2 of the CJA, according to Sloth-Nielsen and Gallinetti, is premised around the fact that 'criminal justice processes and procedures adopted must be oriented towards values that are by definition held to be characteristic of *Ubuntu*.'<sup>960</sup> Looking at the section one cannot fail to discern that these values underpin that the theory of *Ubuntu* 'requires the fostering of a child's sense of dignity and worth, and reinforcement of the child's respect for the human rights and fundamental freedoms of others.'<sup>961</sup> According to Sloth-Nielsen and Gallinetti, this broad 'injunction clearly covers more than merely the end result of a criminal process (e.g. sanction or sentence) but spans the entire gamut of dealings with the child in the justice system, i.e. from the first contact (or arrest) throughout the procedure.'<sup>962</sup>

The third characteristic advanced by Sloth-Nielsen and Gallinetti is the discouragement of revenge, banishment, exclusion or retaliation/expiation tradition of criminal procedure under African law, which are notable characteristics in most African criminal justice systems.<sup>963</sup> Instead, the CJA accords with the well known dimensions of reconciliation and restorative justice, both of which are referred to directly among the objects of *Ubuntu* in section 2(b)(iii). This has to be in harmony

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<sup>959</sup> Section 70 of the CJA.

<sup>960</sup> Ibid.

<sup>961</sup> Ibid, p. 71.

<sup>962</sup> Ibid.

<sup>963</sup> Ibid. See also Keevy, op. cit. p. 19.

with safeguarding the interests of the victim<sup>964</sup> and the community affected by the crime.<sup>965</sup> This argument was seen most recently in the case of *M v S (Centre for Child Law Amicus Curiae)*<sup>966</sup> where Sachs, J. discussed correctional supervision as a sentence that allows for restorative justice: ‘Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control.’<sup>967</sup>

#### **6.4 The Guiding Principles of the Child Justice Act**

The CJA is couched in a very detailed, progressive approach with regard to its implementation in that it sets out certain Guiding Principles to enable smooth implementation. This represents a radical break with the hitherto traditional criminal justice system.<sup>968</sup> These Guiding Principles must be taken into account when implementing the CJA.<sup>969</sup> The principles are expressly set out in Section 3 of the CJA as follows: first, all consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society. Second, a child must not be treated more severely than an adult would have been treated in the same circumstances. Third, every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of the CJA, where decisions affecting him or her might be taken. Fourth, every child should

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<sup>964</sup> Section 2(b)(ii) of the CJA.

<sup>965</sup> Ibid. Section 2(b)(iv).

<sup>966</sup> 2007 (12) BCLR 1312 (CC).

<sup>967</sup> For a thorough discussion of the case see Skelton, A., "Severing the Umbilical Cord: A Subtle Jurisprudential Shift Regarding Children and their Primary Caregivers." *Constitutional Court Review*, 2008.

<sup>968</sup> Courtenay, R.M., "S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)", op. cit.

<sup>969</sup> See particularly Gallinetti, J., *Getting to Know the Child Justice Act*. Bellville: Child Justice Alliance, 2009.

be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.<sup>970</sup>

Fifth, every child should be treated in a manner which takes into account his or her cultural values and beliefs. Sixth, all procedures in terms of this Act should be conducted and completed without unreasonable delay. Seventh, parents, appropriate adults and guardians should be able to assist children in proceedings in terms of the CJA; and, wherever possible, participate in decisions affecting them. Eighth, a child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences. Ninth, consideration should be made on the rights and obligations of children contained in international and regional instruments, with particular reference to the CRC and the ACRWC.<sup>971</sup>

A cursory glance at the foregoing guiding principles reveals their importance in providing guidance and authority to the juvenile justice institutions and personnel implementing and applying the CJA.

## **6.5 Salient Features of the Child Justice Act**

This part examines the salient features of the CJA, which include the minimum age of criminal responsibility (MACR); methods of securing attendance of offending

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<sup>970</sup> Section 3 of the CJA.

<sup>971</sup> Ibid. See also Gallinetti, J., *Getting to Know the Child Justice Act*, op. cit; and Julia, Sloth-Nielsen and J. Gallinetti, “Just Say Sorry?” *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008”, op. cit.

children in courts; release and detention or placement of children in conflict with the law; assessment of offending children; diversion and sentencing of children found to have offended penal law.

### **6.5.1 Criminal Capacity of Children and Minimum Age of Criminal Responsibility**

As opined by Odongo, the issue of age and criminal responsibility relates to two distinct aspects: first, it relates to the age at which children are deemed as having no mental capacity to commit a crime (*doli incapax*); and, second it relates to the age at which it is appropriate to render them liable to prosecution and formal sanctions (*doli capax*).<sup>972</sup> In principle, the “age of criminal responsibility” refers to ‘the mental capacity of children (cognitive and connative) to commit crimes’<sup>973</sup>, for which they may be prosecuted and found guilty of offending. Children below this age (the minimum age of criminal responsibility) are considered as lacking the capacity to commit crimes. Cappelaere, et al, define the “age of criminal responsibility” as referring to ‘the age at which a person is considered capable of discernment (the capacity to distinguish right from wrong) and therefore bearing the responsibility for his criminal acts. It is the age from which the child is judged capable of contravening the criminal law’.<sup>974</sup> On the other hand, the age at which a person becomes liable to the adult criminal justice system (with the full procedures and penalties of the

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<sup>972</sup> Odongo, op. cit, pp. 131-2, note 5. See also Bottoms, A. and J. Dignan, “Youth Justice in Great Britain.” In Tonry, M. and A.N. Doob, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives (Volume 31)*. Chicago & London: The University of Chicago Press, 2004, p. 121.

<sup>973</sup> Odongo, *ibid*.

<sup>974</sup> See Cappelaere, G., et al, *Children Deprived of Liberty: Rights and Realities*. Amsterdam: Defence for Children International, 2005, p. 26.

ordinary criminal law being considered applicable) is treated as the upper age of criminal responsibility.<sup>975</sup>

In assessing the criminal capacity of children at common law, courts consider such factors as the educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child, the nature and seriousness of the alleged offence, the impact of the offence on any victim, and the interests of the community. Other factors are the probation officer's assessment report, the prospects of establishing criminal capacity if the matter were to be referred to preliminary inquiry, the appropriateness of diversion and other relevant factors.<sup>976</sup>

#### **(a) The Age of Criminal Capacity in International Law**

The UN Committee on the Rights of the Child (the CROC) has often been concerned 'about the (very) low age of criminal responsibility in too many States Parties, which often belong to the Commonwealth and have inherited the low minimum age from British rule. The CRC requires that States Parties set a minimum age for criminal responsibility but without providing further information on what is acceptable in that regard.'<sup>977</sup> Accordingly, the Beijing Rules limit themselves to the rule that the minimum age for criminal responsibility should not be too low. From the many recommendations of the CROC to the States Parties in this regard,

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<sup>975</sup> Odongo, op. cit.

<sup>976</sup> Wakefield, L. and V. Odaga, "The Activities of the Child Justice Alliance during 2011." *Article 40*. Vol. 13 No. 2, September 2011.

<sup>977</sup> Doek, J., "Child Justice Trends and Concerns with a Reflection on South Africa." In Gallinetti, J. et al (eds.), *Child Justice in South Africa: Children's Rights under Construction*. Newlands/Cape Town: Open Society Foundation for South Africa and Child Justice Alliance, 2006, p. 13.

... it can be concluded that in all instances where the minimum age for criminal responsibility was below the age of 12 years, the Committee recommended an increase of that age without explicitly stating what it should be. However, it may nevertheless be concluded that the *de facto* acceptable lowest minimum age for criminal responsibility is 12 years and that the Committee favours a minimum age for criminal responsibility higher than 12 years.<sup>978</sup>

As Prof. Jaap Doek (former chairperson of the CROC) argues, the practice of the implementation of this rule gives reason for concern. According to him, in many countries, ‘the prosecutor has the discretion to decide whether he or she will charge the child.’<sup>979</sup> Because of this the CROC ‘is not in favour of the *doli incapax* rule and would prefer to set the minimum age at the level where the States Parties would like it to be in principle.’<sup>980</sup> The CROC considers 14 years to be appropriate ‘as this is the age when children are considered to be *doli capax*.’<sup>981</sup>

### **(b) Application of the CJA on Age of Criminal Capacity**

The age of criminal capacity in South Africa is determined in the context of the common law doctrine of *doli capax/doli incapax*, whereby under this rule a child below the prescribed age is presumed to lack criminal capacity.<sup>982</sup> In fact, the rationale for this doctrine can be found in the Commission’s Report on Juvenile Justice ‘where it is reasoned that the presumptions create a “protective mantle” to immediately cover children of specified ages as each child’s level of maturity and development differs.’<sup>983</sup> Thus, this doctrine ‘provides flexibility and protection for

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<sup>978</sup> Ibid.

<sup>979</sup> Ibid.

<sup>980</sup> Ibid.

<sup>981</sup> Ibid.

<sup>982</sup> Skelton, A., “Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice.” *Acta Juridica*, pp. 180-196.1996. See also Zenzile, E., “Juvenile Delinquency Among Secondary School Pupils in the Mthatha District of Education: A Self-Report Survey.” MA Dissertation, University of Zululand, 2008, p. 16.

<sup>983</sup> Gallinetti, J., *Getting to Know the Child Justice Act*, op. cit.



children aged between 10 and 14 years who differ in emotional and intellectual understanding during those developmental years.’<sup>984</sup>

In South Africa, ‘those children under 14 but over 7 years older’<sup>985</sup>, are deemed to lack criminal capacity unless the State proves that the child in question can distinguish between right and wrong and knows the wrongfulness of offending at the time of commission of the offence.’<sup>986</sup> However, this age has been criticised by Prof.

Doek in the following regards:

The minimum age for criminal responsibility of 10 years in the South African Bill does not meet this standard. One could argue that the minimum age is in fact 14 years because children of 10 to 14 years of age fall under the rule of *doli incapax*, meaning that there is a rebuttable presumption that the child lacked criminal responsibility.’<sup>987</sup>

Although the *doli incapax* presumptions were designed in order to protect children, it has been noted that they can easily be rebutted, and that they do not, in fact, present an impediment to the prosecution and conviction of young people. Zenzile, for example, provides a very interesting instance in the following regard: ‘mothers of children are asked to indicate whether their children understand the difference between right and wrong. An answer in the affirmative is often considered sufficient grounds to rebut the presumption of *doli incapax*.’<sup>988</sup>

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<sup>984</sup> Ibid.

<sup>985</sup> This age may be reviewed, with a view to raising it, in terms of section 8 of the CJA, which states that:

‘8. In order to determine whether or not the minimum age of criminal capacity as set out in section 7(1) should be raised, the Cabinet member responsible for the administration of justice must, not later than five years after the commencement of this section, submit a report to Parliament, as provided for in section 96(4) and (5).’

<sup>986</sup> Zenzile, op. cit.

<sup>987</sup> Doek, J., “Child Justice Trends and Concerns with a Reflection on South Africa.” Op. cit, p. 13.

<sup>988</sup> Ibid.

Furthermore, the courts have noted that caution should be exercised where the accused are illiterate, ‘unsophisticated, and more so when they are children, with limited grasp of proceeding.’<sup>989</sup> Provisions for the minimum age of criminal capacity are set out in Section 4 of the CJA. In terms of subsection (1) of this section, a child may possess criminal capacity if alleged to have committed an offence and ‘was under the age of 10 years at the time of the commission of the alleged offence.’ A child may also possess the capacity to commit an offence if he or she was 10 years or older but under the age of 18 years when he or she was: handed a written notice in terms of Section 18 or 22; served with a summons in terms of Section 19; or arrested in terms of Section 20, for that offence.

Under subsection (2) of Section 4, the Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of Section 97(4)(a)(i)(aa), direct that the matter be dealt with in terms of Section 5(2) – (4) in the case of a person who is alleged to have committed an offence when he or she was under the age of 18 years; and is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b). Under Section 5(2) every child 10 years or older, who is alleged to have committed an offence and who is required to appear at a preliminary inquiry in respect of that offence ‘must, before his or her first appearance at the preliminary inquiry, be assessed by a probation officer, unless assessment is dispensed with in terms of

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<sup>989</sup> Ibid. See also Skelton, op. cit; South African Law Commission 1997, op. cit; and *S v M* 1982 (1) SA 240 (N).

Section 41(3)<sup>990</sup> or 47(5)<sup>991</sup>.’ In terms of Section 5 (3) a preliminary inquiry’ must be held in respect of every child referred to in subsection (2) after he or she has been assessed,’ except where the matter has been diverted in accordance with Chapter 6<sup>992</sup>; involves a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved, as provided for in Section 10(2)(b)<sup>993</sup>; or has been withdrawn.

Under Section 5(4) (a) a matter in respect of a child referred to in subsection (2) ‘may be considered for diversion by a prosecutor in accordance with Chapter 6; or (ii) at a preliminary inquiry in accordance with Chapter 7<sup>994</sup>. In terms of paragraph (b) of Section 5(4), a matter which is for any reason not diverted in terms of paragraph (a) must unless the matter has been withdrawn or referred to a children’s court, be referred to a child justice court for plea and trial in terms of Chapter 9<sup>995</sup>. According to paragraph (c) of Section 5(4): ‘A matter in respect of a child referred to in paragraph (b) may, before the conclusion of the case for the prosecution, be considered for diversion by a child justice court in terms of Chapter 9.’

### **(c) Criminal Capacity of Children under the Age of 14 Years**

The second arm of age of criminal responsibility under the CJA relates to those children committing offences under the age of 14 years. In terms of Section 7(1), a child who commits an offence while under the age of 10 years ‘does not have

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<sup>990</sup> Dealing with diversion by a prosecutor before preliminary inquiry in respect of offences referred to in Schedule 1 to the CJA.

<sup>991</sup> Dealing with procedure relating to holding of preliminary inquiry.

<sup>992</sup> Dealing with diversion by prosecutors in respect of minor offences.

<sup>993</sup> Dealing with decision to prosecute child who is 10 years or older but under the age of 14 Years.

<sup>994</sup> Dealing with preliminary inquiry.

<sup>995</sup> Dealing with trial in the child justice court.

criminal capacity and cannot be prosecuted for that offence, but must be dealt with in terms of Section 9.<sup>996</sup> The provisions on how to deal with children committing offences but are under the age of criminal responsibility are in line with contemporary international law requirement that states must also legislate on how to deal with such children while setting the minimum age of criminal responsibility.<sup>997</sup> It has been said that ‘failure to recognize a link between setting a minimum age and how to deal with children below the minimum age leads to the possibility of serious violations of children’s rights. This makes provision for children below the minimum age a key to this aspect of the children’s rights model, just as the rule on setting a minimum age is.’<sup>998</sup>

Therefore, the CJA has set out the manner through which children who are under the minimum age of criminal responsibility should be dealt with. This is set out in Section 9(1), which provides that: ‘Where a police official has reason to believe that a child suspected of having committed an offence is under the age of 10 years, he or she may not arrest the child.’ Such police official must immediately hand the child over to his or her parents or an appropriate adult or a guardian. If there is no parent, appropriate adult or a guardian is available or if it is not in the best interests of the child to be handed over to the parent, an appropriate adult or a guardian, a child should be handed over to a suitable child and youth care centre, and the police official must notify a probation officer about this action.

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<sup>996</sup> Dealing with the manner of dealing with child under the age of 10 years.

<sup>997</sup> See particularly Cantwell, N., “Juvenile Justice.” In UNICEF, *Innocenti Digest No. 3 on Juvenile Justice*. Florence: UNICEF, 1998, p. 4; and Odongo, op. cit, p. 183.

<sup>998</sup> Odongo, ibid, pp. 183-4.

A probation officer, who receives notification from a police official in terms of subsection (1) of Section 9, must assess the child in terms of the provisions of Chapter 5<sup>999</sup> which are applicable to children under the age of 10 years as soon as possible; but not later than seven days after being so notified.<sup>1000</sup> According to Section 9(3)(a), after assessing<sup>1001</sup> a child in terms of subsection (2), the probation officer may:

- (a) refer the child to the children's court on any of the grounds set out in section 50;
- (b) refer the child for counselling or therapy;
- (c) refer the child to an accredited programme designed specifically to suit the needs of children under the age of 10 years;
- (d) arrange support services for the child;
- (e) arrange a meeting, which must be attended by the child, his or her parent or an appropriate adult or a guardian, and which may be attended by any other person likely to provide information for the purposes of the meeting referred to in subsection (4); or
- (f) decide to take no action.

It should be noted, however, that under Section 9(3)(b), any action taken under paragraph (a) 'does not imply that the child is criminally liable for the incident that led to the assessment.'

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<sup>999</sup> Dealing with assessment of children in the juvenile justice system.

<sup>1000</sup> Section 9(2) of the CJA.

<sup>1001</sup> Under Section 9(6): 'The probation officer must record, with reasons, the outcome of the assessment and the decision made in terms of subsection (3) in the prescribed manner.'

In the event of a child failing to comply with any obligation imposed in terms of this section, including compliance with the written plan referred to in subsection (4)(b), the probation officer must refer the matter to a children's court to be dealt with in terms of Chapter 9 of the CJA.<sup>1002</sup> Under subsection (2) of Section 7 of the CJA, a child 'who is 10 years or older but under the age of 14 years and who commits an offence is presumed to lack criminal capacity, unless the State proves that he or she has criminal capacity in accordance with section 11'<sup>1003</sup>.

The implication of this rule in practice is embedded in the common law<sup>1004</sup> rebuttable presumption that 'children under the age of fourteen years [are] *doli incapax*<sup>1005</sup> in the sense that a case against an alleged child offender under 14 years of age would not proceed until the prosecution proves beyond reasonable doubt that the defendant was capable of appreciating the difference between right and wrong.'<sup>1006</sup> The CJA is very emphatic on this issue as under Section 11(1) it makes mandatory that the State must prove, beyond reasonable doubt, that a child who is 10 years or older but under the age of 14 years, has the capacity to appreciate the difference between right and wrong at the time of the commission of an alleged offence and to act in accordance with that appreciation.

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<sup>1002</sup> Ibid, Section 9(7).

<sup>1003</sup> Dealing with proof of criminal capacity.

<sup>1004</sup> Section 7. (3) of the CJA states categorically that: 'The common law pertaining to the criminal capacity of children under the age of 14 years is hereby amended to the extent set out in this section.'

<sup>1005</sup> This doctrine simply means "incapable of evil".

<sup>1006</sup> Odongo argues that: 'While the age of 14 has been identified as having been linked with the age of puberty in Roman law, reasons for the choice of ... the minimum age of criminal capacity in this common law rule remain unclear.' Odongo, op. cit, p. 153 (note 75).

The rationale for this requirement is also a common law creature predicated in the principle that ‘young children are slow to develop mental capacity and ... that the criminal justice system is an inappropriate place to deal with their misbehaviour.’<sup>1007</sup> Accordingly, in making a decision regarding the criminal capacity of the child in question, the inquiry magistrate, for purposes of diversion; or, if the matter has not been diverted, the child justice court, for purposes of plea and trial, must consider the assessment report of the probation officer referred to in Section 40 and all evidence placed before the inquiry magistrate or child justice court prior to diversion or conviction, as the case may be, which evidence may include a report of an evaluation referred to in subsection (3) of Section 11.<sup>1008</sup>

In terms of subsection (3) of Section 11 of the CJA, an inquiry magistrate or child justice court may, *suo mottu*, or on the request of the prosecutor or the child’s legal representative, order an evaluation of the criminal capacity of the child referred to in subsection (1) of Section 11 by a suitably qualified person. The evaluation must include an assessment of the cognitive, moral, emotional, psychological and social development of the child. If an order has been made by the inquiry magistrate or child justice court in terms of subsection (3) of section 11, the person identified to conduct an evaluation of the child must furnish the inquiry magistrate or child justice court with a written report of the evaluation within 30 days of the date of the order.<sup>1009</sup> Where an inquiry magistrate or child justice court has found that a child’s criminal capacity has not been proved beyond reasonable doubt, the inquiry

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<sup>1007</sup> Ibid, p. 130.

<sup>1008</sup> Section 11(2) of the CJA.

<sup>1009</sup> Ibid, Section 11(4).

magistrate or child justice court may, if it is in the interests of the child, cause the child to be taken to a probation officer for any further action in terms of Section 9.<sup>1010</sup>

In view of subsection (2) of Section 10 of the CJA, if the prosecutor decides in respect of a child referred to in subsection (1) that criminal capacity is likely to be proved in terms of Section 11, he or she may undertake one of the following options: divert the matter in terms of Chapter 6 if the child is alleged to have committed an offence referred to in Schedule 1; or refer the matter to a preliminary inquiry as provided for in Chapter 7. If the offence not likely to be proved in terms of Section 11, the prosecutor may cause the child to be taken to a probation officer to be dealt with in terms of Section 9.

#### **(d) Age Determination and/or Estimation**

In order to adequately decide whether or not to process a child who has committed an offence in the juvenile justice system it is always fundamental to determine the age of such child. In recognition of this notion, the CJA has set out specific provisions for determination of age of the child to be dealt with in the juvenile justice system. There are certain circumstances in which age can be determined or estimated under the CJA: estimation by a probation officer, an inquiry magistrate, a child justice court or any other court before which a child is charged. These circumstances are described below.

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<sup>1010</sup> Ibid, Section 11(5).



***(i) Responsibility of a Police Officer where Age of a Child is Uncertain***

The duty to facilitate determination of age lies first with a police officer involved in the processing of a child accused of committing an offence. Under Section 12(a) if a police official is uncertain about the age of a person suspected of having committed an offence but has reason to believe that the person may be a child under the age of 10 years, the official must act in accordance with the provisions of Section 9 of the CJA, which deals with the manner of dealing with child under the age of 10 years. If the official is uncertain about the age of a person suspected of having committed an offence but has reason to believe that the person may be a child who is 10 years or older but under the age of 14 years, or a child who is 14 years or older but under the age of 18 years, the police official must treat the person as a child. In such case due regard must be had to the provisions relating to arrest in terms of Chapter 3; or release or detention in terms of Chapter 4, and, in particular, Section 27 relating to placement options before a child's first appearance at a preliminary inquiry.<sup>1011</sup>

***(ii) Age Estimation by a Probation Officer***

A probation officer is duty-bound, under Section 13(1) of the CJA, to estimate the age of the child during an assessment of a child in terms of Chapter 5 of the CJA. The age of the child to be so determined must be the age at the time of the commission of the alleged offence. In making the estimation, the probation officer must consider any available information, including: a previous determination of age by a magistrate under the CJA or under the Criminal Procedure Act (the CPA) or an estimation of age in terms of the Children's Act. Statements made by a parent, an

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<sup>1011</sup> Section 12(a) of the CJA.

appropriate adult, guardian or any other person, including a religious or community leader, likely to have direct knowledge of the age of the child may also be considered. A statement made by the child concerned as well as a school registration form, school report, other document of a similar nature, a baptismal or other similar religious certificate should be considered. An estimation of age by a medical practitioner can also be considered.<sup>1012</sup>

Under subsection (3) of Section 13 of the CJA, the probation officer ‘must submit the estimation on the prescribed form, together with any relevant documentation to the inquiry magistrate before the child’s appearance at a preliminary inquiry.’ However, the estimation of age by a probation officer in terms of this section may be altered and a different estimation of age may be recorded when evidence to the contrary emerge at any stage before sentence is passed.<sup>1013</sup>

***(iii) Age Determination by an Inquiry Magistrate or Child Justice Court***

An inquiry magistrate or a child justice court also may determine the age of a child charged before it, if, during a preliminary inquiry or during proceedings before a child justice court, the age of a child at the time of the commission of the alleged offence is uncertain.<sup>1014</sup> In order to determine the age of a child, a presiding court officer may: first, consider the form and any documentation submitted by the probation officer in terms of Section 13(3); second, require any relevant documentation, information or statement from any person; third, subpoena any

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<sup>1012</sup> Ibid, Section 13(2).

<sup>1013</sup> Ibid, Section 13(3).

<sup>1014</sup> Ibid, Section 14(1).

person to produce the documentation, information or statements referred to in paragraph (b); or, fourth, if necessary, refer the child to a medical practitioner, in the prescribed manner, for an estimation of age.<sup>1015</sup>

Under Section 14(3) (a), the presiding officer is obliged to ‘enter the age determined in terms of subsection (1) into the record of the proceedings as the age of the child.’ When evidence to the contrary emerges, the presiding officer ‘must alter the record to reflect the correct age.’<sup>1016</sup>

***(iv) Age Determination by Any Other Court***

The determination of age of a person appearing before any other court may be done by the court where there is any uncertainty as to whether such person was over or under the age of 18 years at the time of the commission of the alleged offence. When this is done, the court must: first, determine the age of that person in accordance with Section 14<sup>1017</sup>; and, second, where necessary, ‘alter the record to reflect the correct age of that person, in accordance with the provisions of Section 16, which apply with the changes required by the context.’<sup>1018</sup>

***(v) Alteration of Error Regarding Age of a Child or Adult before the Court***

As it can be gathered from the provisions of Sections 13, 14 and 15 of the CJA discussed above, the age determined or estimated by the respective persons is not written on stones. The law is reasonably flexible where there are emerging

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<sup>1015</sup> Ibid, Section 14(2).

<sup>1016</sup> Ibid, Section 14(3)(b).

<sup>1017</sup> Ibid, Section 15(a).

<sup>1018</sup> Ibid, Section 15(b).

circumstances indicating that the age first determined was erroneous, consequent to which the concerned officer, particularly the presiding court officer, has power to alter such age in writing.

This legal flexibility is specifically canvassed by the provisions of Section 16(1) of the CJA, which provides that,

16. (1) If, at any stage during proceedings in terms of this Act, a presiding officer is satisfied on the basis of evidence placed before him or her that the age of a child or adult who is alleged to have committed an offence (hereafter in this section referred to as person) is incorrect, the age must be altered on the record of the proceedings in accordance with section 14.

When this happens, the proceedings must be finalised in accordance with the provisions of the CJA, if the person is found to be a child<sup>1019</sup>; or the CPA, if the person is found to be an adult, unless the provisions of Section 4(2) are applicable.<sup>1020</sup>

If a presiding officer is of the opinion that an error regarding age may have caused any prejudice to a person during the proceedings in question, he or she ‘must transmit the record of the proceedings to the registrar of the High Court having jurisdiction, in the same manner as provided for in Section 303 of the Criminal Procedure Act, in which event the proceedings must be dealt with in terms of the procedure on review as provided for in Section 304 of the Criminal Procedure Act.’<sup>1021</sup> If a presiding officer is of the opinion that an error regarding age has not caused any prejudice to the person, he or she must continue with the proceedings in

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<sup>1019</sup> Ibid, Section 16(1)(a).

<sup>1020</sup> Ibid, Section 16(1)(b).

<sup>1021</sup> Ibid, Section 16(2).

terms of the provisions of the CJA, in accordance with his or her age, as altered<sup>1022</sup>, subject to subsection (1) of Section 16 of the CJA.

### **6.5.2 Methods of Securing Attendance of a Child at Preliminary Inquiry**

The methods of securing the attendance of a child at a preliminary inquiry are set out in Section 17(1) of the CJA, which are, foremost, through a written notice, as provided for in Section 18; second, by a summons, as provided for in Section 19; or, third, by arrest, as provided for in Section 20. In terms of subsection (2) of Section 17, where circumstances permit, ‘a police official should obtain guidance from the Director of Public Prosecutions or a prosecutor on whether or not the child is required to attend a preliminary inquiry and, if so, the manner in which the child’s attendance should be secured.’

### **6.5.3 Release or Detention of a Child Prior to Sentence**

This part examines the provisions relating to release and detention of children in conflict with the law, which are important features of the CJA.

#### **(a) Approach Followed when Considering Release or Detention of a Child after Arrest**

It should be borne in mind that children have the right to liberty, care and family life, which must enjoy the fullest protection possible and that limitation or infringement thereof must be subject to strict judicial control.<sup>1023</sup> When it is necessary that they

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<sup>1022</sup> Ibid, Section 16(3).

<sup>1023</sup> Courtenay, R.M., “S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)”, op. cit.

should be removed from the family environment, children are entitled to appropriate alternative care and protection.<sup>1024</sup> Section 21(1) of the CJA provides categorically that: ‘When considering the release or detention of a child who has been arrested, preference must be given to releasing the child.’ The approach for achieving this goal is set out in subsections (2) and (3) of Section 21. According to subsection (2)(a), prior to the child’s first appearance at a preliminary inquiry a police official must, in respect of an offence referred to in Schedule 1, ‘where appropriate, release a child on written notice into the care of a parent, an appropriate adult or guardian in terms of Section 18, read with Section 22.’ A prosecutor may also, in respect of an offence referred to in Schedule 1 or 2, authorise the release of a child on bail in terms of Section 25.<sup>1025</sup> This provision is premised on the premise that:

... detention should never be used as a mechanism of simply restoring structure, discipline or education to a “troubled or troublesome” child who has had the misfortune of being the product of a poor social upbringing or who lacks adequate parental control. Rather such children should be dealt with as either children in need of care and protection or be diverted away from the court-based justice system should they have acknowledged that they have indeed committed the offence.<sup>1026</sup>

In terms of subsection (3) of Section 25 of the CJA, a presiding officer may, at a child’s first appearance at a preliminary inquiry or thereafter at a child justice court, in respect of any offence, release a child into the care of a parent, an appropriate adult or guardian in terms of Section 24(2)(a); in respect of an offence referred to in Schedule 1 or 2, release a child on his or her own recognisance in terms of Section 24(2)(b). Where a child is not released from detention in terms of paragraph (a) or (b), the presiding officer may release the child on bail in terms of Section 25.

<sup>1024</sup> See particularly Section 28(1)(b) of the Constitution of South Africa.

<sup>1025</sup> Read with Section 59A of the CPA, in which case the reference to Schedule 7 in Section 59A of that CPA is to be regarded as a reference to Schedule 2 of the CJA.

<sup>1026</sup> Courtenay, R.M., “S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)”, *op. cit.*

### **(b) Release of Child on Written Notice**

The CJA provides that a police official must release a child on written notice in terms of Section 18 into the care of a parent, an appropriate adult or guardian if the child is in detention in police custody in respect of an offence referred to in Schedule 1, as soon as possible, and before the child appears at the preliminary inquiry.<sup>1027</sup> This may not take place where the child's parent or an appropriate adult or guardian cannot be located or is not available and all reasonable efforts have been made to locate the parent or appropriate adult or guardian. Release may not be opted where there is a substantial risk that the child may be a danger to any other person or to himself or herself.<sup>1028</sup>

It is the law that where a child has not been released in terms of subsection (1) of Section 22, the investigating police official 'must provide the inquiry magistrate with a written report in the prescribed manner, giving reasons why the child could not be released, with particular reference to the factors referred to in subsection (1)(a) or (b).'<sup>1029</sup>

### **(c) Duty of Police Official when Releasing a Child**

The CJA imposes a duty on a police official who releases a child from detention in terms of Section 22 and places the child in the care of a parent or an appropriate adult or guardian. Under Section 23, it is provided that a police official who releases a child from detention in terms of Section 22 and places the child in the care of a

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<sup>1027</sup> Section 22(1) of the CJA.

<sup>1028</sup> Ibid.

<sup>1029</sup> Ibid, Section 22(2).

parent or an appropriate adult or guardian, ‘must, at the time of the release of the child, hand to the child and to the person into whose care the child is released, a written notice in accordance with Section 18.’

#### **(d) Release of a Child**

Under Section 24 of the CJA, the presiding officer must, subject to subsection (2)(b) of this section, consider the release of the child, where such child, being in detention in respect of any offence, appears at a preliminary inquiry and the inquiry is to be postponed, or the matter, at the conclusion of the preliminary inquiry, is set down for trial in a child justice court; or at a child justice court and the matter is to be postponed. A presiding officer may, under subsection (2) of this section, release a child referred to in subsection (1) into the care of a parent, an appropriate adult or guardian; or, if the child is alleged to have committed an offence referred to in Schedule 1 or 2, on the child’s own recognisance, if it is in the interests of justice to release the child.

In considering whether or not it would be in the interests of justice to release a child in terms of subsection (2) of Section 24, the presiding officer must have regard to the recommendations of the probation officer’s assessment report and all other relevant factors. These factors include: the best interests of the child; whether the child has previous convictions; the fact that the child is 10 years or older but under the age of 14 years and is presumed to lack criminal capacity; the interests and safety of the



community in which the child resides; and the seriousness of the offence.<sup>1030</sup> Under subsection (4) of Section 24 of the CJA, the presiding officer must, when releasing a child, warn him or her to appear on a specified date and at a specified time and place and may impose one or more conditions.<sup>1031</sup>

In terms of subsection (5), if a child is released into the care of a parent, appropriate adult or guardian, the presiding officer ‘must direct the parent, appropriate adult or guardian to appear and warn the parent, appropriate adult or guardian to ensure that the child appears on a specified date and at a specified time and place and, if a condition has been imposed in terms of this section, to ensure that the child complies with that condition.’ If a child is released on his or her own recognisance, the presiding officer ‘must warn the child to appear on a specified date and at a specified time and place and, if a condition has been imposed in terms of this section, to comply with that condition.’<sup>1032</sup>

The consequence of a child’s failure to comply with the foregoing conditions is set out in subsection (7)(a) of Section 24 to the effect that the presiding officer ‘may, on being notified of the failure ‘issue a warrant for the arrest of the child or cause a summons to be issued in accordance with Section 19, for the child to appear at the

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<sup>1030</sup> Ibid. Section 24(3).

<sup>1031</sup> Under section 24(4) the conditions imposed may include informing the child to:

- (a) report periodically to a specified person or at a specified place;
- (b) attend a particular school;
- (c) reside at a particular address;
- (d) be placed under the supervision of a specified person;
- (e) not interfere with any witness, tamper with any evidence or associate with any person or group of specified persons; or
- (f) comply with any other condition that the presiding officer deems fit in the circumstances..

<sup>1032</sup> Ibid, Section 24(6).

preliminary inquiry or child justice court.’ When a child appears before a presiding officer pursuant to a warrant of arrest or summons referred to above, the presiding officer must inquire into the reasons for the child’s failure to appear or comply with the conditions or to remain in attendance and make a determination whether or not the failure is due to the child’s fault.

#### **(e) Release of a Child on Bail**

Chapter 9 of the CPA applies to an application for the release of a child on bail, except for Sections 59 and 59A, to the extent set out in Section 21(2)(b) of the CJA.<sup>1033</sup> According to subsection (2) of Section 25 of the CJA, an application for the release of a child, referred to in Section 21(3)(c), on bail, must be considered in the three stages. First, whether the interests of justice permit the release of the child on bail. Second, if so, a separate inquiry must be held into the ability of the child and his or her parent, an appropriate adult or guardian to pay the amount of money being considered or any other appropriate amount. Third, if after an inquiry referred to above, it is found that the child and his or her parent, an appropriate adult or guardian are unable to pay any amount of money, the presiding officer must set appropriate conditions that do not include an amount of money for the release of the child on bail; or where the child or his or her parents or appropriate adult are able to pay an amount of money, the presiding officer must set conditions for the release of the child on bail and an amount which is appropriate in the circumstances.

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<sup>1033</sup> Ibid, Section 25 (1).

#### 6.5.4 Placement of a Child

The placement of a child in conflict with the law awaiting trial in court has been a critical issue in many jurisdictions, both before and after the adoption of the CRC and the ACRWC. In many jurisdictions, the placement of children in remand facilities has been characterised by a chronic lack of protection of children's rights in terms of the facilities themselves, lack of sufficient number of separate placement facilities resulting in putting children in adult prisons as well as lack of specialised juvenile personnel to properly help those children.<sup>1034</sup> The CROC has, for instance, indicated that there has been excessive resort to deprivation of liberty against children who commit offences prior to trial.<sup>1035</sup> In many jurisdictions around the world, there have been recorded arbitrary arrests and massive violations of the rights of children living and or working in the street (street children)<sup>1036</sup>, most of whom end up being arrested by the police and detained for status offences like loitering. As the CROC has noted, frequent and excessive arrests of street children in many countries has been largely due to their low status, frequently confronted with general social exclusion and stigmatization, including ill treatment by police officials.<sup>1037</sup> In some

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<sup>1034</sup> See, for instance, Tomasevski, K. (ed.), *Children in Adult Prisons: An International Perspective*. London: Frances Printer, 1986, p. 103.

<sup>1035</sup> United Nations Committee on the Rights of the Child, "Recommendations from the Day of General of Discussion on Juvenile Justice." Excerpted from United Nations Committee on the Rights of the Child, "Report on Tenth Session, CRC/C/43, Annex VIII, 10<sup>th</sup> Session, 13 November 1995, para 219.

<sup>1036</sup> A definition of street children formulated by the Inter-NGO Programme for Street Children and Street Youth states that: "Street children are those for whom the street (in the widest sense of the word, i.e. unoccupied dwellings, wasteland etc.) more than their family has become their real home, a situation in which there is no protection, supervision or direction from responsible adults." Ennew, J., *Street and Working Children: A Guide to Planning*. London: Save the Children, 1994, p. 15.

<sup>1037</sup> Odongo, op. cit.

jurisdictions, arbitrary arrests and detention of children have been recorded on the guise of a lame excuse that such children are in “need of care and protection”.<sup>1038</sup>

However, as discussed in Chapter Four of this thesis, the deprivation of liberty for children accused of committing offences should be a matter of last resort. Recognizing the primacy of this principle, the CROC has regularly discouraged the practice of relying heavily on arrests and detention of offending children, as it affects concerned children both physically and mentally.<sup>1039</sup> The CROC has, therefore, encouraged States Parties to establish separate juvenile justice systems that discourage arrests and detention of children in conflict with the law. In compliance with this, many countries that have recently enacted juvenile justice laws that have reflected this principle in their laws. South Africa is one of such countries that have paid heed to this call, as shall be discussed below.

#### **(a) Approach Followed when Considering Placement of a Child**

As noted above, through the CJA South Africa has managed to come out with effective arrangements for how to protect the basic rights and fundamental freedoms of children placed in detention facilities. The approach to be followed when considering placement of a child is laid down in Section 26, which states that if, after due consideration of the options for release of a child in terms of Part I of this law, ‘a decision is made that the child is to be detained or is to remain in detention a police official or presiding officer must give preference to the least restrictive option

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<sup>1038</sup> See Gallinetti, J. “Diversion”. In Sloth- Nielsen, J. and J. Gallinetti (eds.), *Child Justice in Africa: A Guide to Good Practice*. Bellville: Community Law Centre, 2004, pp. 66-73, at p. 66.

<sup>1039</sup> CROC, “Concluding Observations: Uruguay.” CRC/C/15/Add.62, 11 October 1996, para 14.

possible in the circumstances, as set out in subsections (2) and (3), beginning with the least restrictive option.’<sup>1040</sup> According to subsection (2) of Section 26 of the CJA, prior to a child’s first appearance at a preliminary inquiry within 48 hours after arrest:

- (a) a police official must, depending on the age of the child and the alleged offence committed by the child, consider the placement of the child in a suitable child and youth care centre in accordance with section 27(a); or
- (b) if placement referred to in paragraph (a) is not appropriate or applicable, a police official must detain the child in a police cell or lock-up, in accordance with section 27(b).

In similar tone, subsection (3) of Section 26 of the CJA provides that a presiding officer may, at a child’s first or subsequent appearance at a preliminary inquiry or thereafter at a child justice court, order the detention of a child in a child and youth care centre in accordance with Section 29; or in prison in accordance with Section 30, subject to the limitations set out in that section.

### **(b) Placement Options for a Child**

Section 27 of the CJA provides that if, at any stage before a child’s first appearance at a preliminary inquiry, the child has not been released from detention in police custody and is charged, the police official must give consideration to the detention of the child in an appropriate child and youth care centre, if a centre is available and there is a vacancy, or if a centre or vacancy is not available, in a police cell or lock-up. A child referred here is one who is either 10 years or older but under the age of 14 years, with any offence; or 14 years or older, with an offence referred to in Schedule 1 or 2. If the child is 14 years or older and is charged with an offence

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<sup>1040</sup> Section 26(1) of the CJA.

referred to in Schedule 3<sup>1041</sup>, the police official must cause the child to be detained in a police cell or lock-up.

### **(c) Protection of Children Detained in Police Custody**

The protection of children detained in police custody is well covered in Section 28, which stipulates that a child who is in detention in police custody must be given adequate treatment. First, such child must be detained separately from adults; and, in such case, boys must be held separately from girls.<sup>1042</sup> Second, such child must be detained in conditions which take into account their particular vulnerability and will reduce the risk of harm to that child, including the risk of harm caused by other children.<sup>1043</sup> Third, the child must be permitted visits by parents, appropriate adults, guardians, legal representatives, registered social workers, probation officers, assistant probation officers, health workers, religious counsellors and any other person who, in terms of any law, is entitled to visit a child deprived of his or her liberty.<sup>1044</sup> Fourth, the child must be cared for in a manner consistent with the special needs of children, including the provision of immediate and appropriate health care in the event of any illness, injury or severe psychological trauma; and adequate food, water, blankets and bedding.<sup>1045</sup>

Under subsection (2) paragraph (a) of Section 28 of the CJA, if any complaint is received from a child or any other person during an arrest or while the child is in

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<sup>1041</sup> This Schedule comprises of serious offences ranging from treason, sedition to murder.

<sup>1042</sup> Section 28(1)(a) of the Child Justice Act.

<sup>1043</sup> Ibid, Section 28(1)(b).

<sup>1044</sup> Ibid, Section 28(1)(c).

<sup>1045</sup> Ibid, Section 28(1)(d)(i)-(ii).

detention in police custody relating to any injury sustained or severe psychological trauma suffered by the child or if a police official observes that a child has been injured or is severely traumatised, that complaint or observation must, in the prescribed manner, be recorded and reported to the station commissioner, who must ensure that the child receives immediate and appropriate medical treatment if he or she is satisfied that any of the circumstances below exist. First, there is evidence of physical injury or severe psychological trauma. Second, the child appears to be in pain as a result of an injury. Third, there is an allegation that a sexual offence, as defined in section 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007)<sup>1046</sup>, has been committed against the child; or there are other circumstances which warrant medical treatment.

In the event of a report being made as referred to in Section 28(2)(a) of the CJA, the report<sup>1047</sup> must, as soon as is reasonably possible, be submitted to the National Commissioner of Police, indicating the nature of the injury sustained or severe psychological trauma suffered by the child; an explanation of the circumstances surrounding the injury or trauma; and a recommendation as to whether or not any further action is required.<sup>1048</sup>

Under subsection (3) of Section 28 the station commissioner of each police station is obliged to keep a register in which prescribed details regarding the detention of all

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<sup>1046</sup> Act No. 32 of 2007.

<sup>1047</sup> Under section 28(2)(c) of the CJA: 'A copy of the medical report, if applicable, must accompany the report by the station commissioner referred to in paragraph (b) [of this subsection], and a further copy must be filed in the docket.'

<sup>1048</sup> Ibid, Section 28(2)(b)(i)-(iii).

children in police cells or lock-ups ‘must be recorded in a manner that entries regarding the detention of children are clearly distinguishable from those of adults.’ This requirement is intended to assist in obtaining data in relation to child offending, separate from data on offending by adults. In principle, the register may be examined by any person, as may be prescribed.<sup>1049</sup>

#### **(d) Placement of Offending Children in a Child and Youth Care Centre**

In certain circumstances, a child, who is alleged to have committed any offence, may be placed in a specified Child and Youth Care Centre (CYCC) under an order of a presiding officer.<sup>1050</sup> Where a presiding officer must decide whether to place a child in a CYCC, consideration must be given to the following factors: the age and maturity of the child; the seriousness of the offence in question; the risk that the child may be a danger to himself, herself or to any other person or child in the CYCC; the appropriateness of the level of security of the CYCC when regard is had to the seriousness of the offence allegedly committed by the child; and the availability of accommodation in an appropriate CYCC.<sup>1051</sup>

In addition, subsection (3) provides that whenever a presiding officer is required to make a decision in terms of subsection (1) of Section 29, the presiding officer must consider the information referred to in Section 40(2), which requires that a recommendation referred to in subsection (1)(d) relating to the placement of the child in a child and youth care centre must be supported by current and reliable

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<sup>1049</sup> Ibid, Section 28(4).

<sup>1050</sup> Ibid, Section 29 (1).

<sup>1051</sup> Ibid, Section 29(2).



information in a prescribed form, obtained by the probation officer from the functionary responsible for the management of the centre regarding the availability or otherwise of accommodation for the child in question<sup>1052</sup>; and the level of security, amenities and features of the CYCC.<sup>1053</sup>

Where the information referred to in subsection (3) is, for any reason, not available, called into question or no longer current, the presiding officer may request the functionary responsible for the management of a child and youth care centre to furnish a prescribed sworn statement in respect of the availability or otherwise of accommodation for the child in question; and all other available information relating to the level of security, amenities and features of the CYCC.<sup>1054</sup>

#### **(e) Placement of a Child in a Prison**

The placement of children in prisons is provided for in Section 30 of the CJA. Subsection (1) of this section provides that a presiding officer may only order the detention of a child in a specified prison, if an application for bail has been postponed or refused or bail has been granted but one or more conditions have not been complied with; the child is 14 years or older; and/or the child is accused of having committed an offence referred to in Schedule 3. The placement may also be done where the detention is necessary in the interests of the administration of justice or the safety or protection of the public or the child or another child in detention;

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<sup>1052</sup> Ibid, Section 40(2)(a).

<sup>1053</sup> Ibid, Section 40(2)(b).

<sup>1054</sup> Ibid, Section 29(4).

and/or there is likelihood that the child, if convicted, could be sentenced to imprisonment.

Under subsection (2) of Section 30, a child who is 14 years or older but under the age of 16 years may only be detained in a prison if, in addition to the factors referred to in subsection (1)(a), (c), (d) and (e) above, the DPP or an authorized prosecutor ‘issues a certificate which confirms that there is sufficient evidence to institute a prosecution against the child for an offence referred to in Schedule 3 and is charging the child with the offence.’ In terms of subsection (3) of the same section, before a decision is made to detain or further detain a child in prison, the presiding officer must consider any recommendations relating to placement in the probation officer’s assessment report, the information referred to in Section 40(2) and any relevant evidence placed before him or her. This includes evidence, where applicable, in respect of the best interests of the child; the child’s state of health; previous convictions, previous diversions or charges pending against the child; or the risk that the child may be a danger to himself, herself or to any other person or child in a CYCC. The information may also include any danger that the child may pose to the safety of members of the public; whether the child can be placed in a CYCC, which complies with the appropriate level of security; the risk of the child absconding from a CYCC; the probable period of detention until the conclusion of the matter; any impediment to the preparation of the child’s defence or any delay in obtaining legal representation, which may be brought about by the detention of the child; the seriousness of the offence in question; or any other relevant factor.

A presiding officer ordering the detention of a child in prison in terms of this section ‘must direct that the child be brought before him or her or any other court every 14 days to reconsider the order.’<sup>1055</sup> In addition, a presiding officer may order the detention of a child who is alleged to have committed an offence referred to in Schedule 1 or 2 in a prison instead of a CYCC, ‘if he or she, in addition to the factors referred to in subsections (1) and (3), finds substantial and compelling reasons, including any relevant serious previous convictions or any relevant pending serious charges against the child, provided that the child is 14 years or older.’<sup>1056</sup> A presiding officer making an order to place a child in a prison in terms of paragraph (a) of subsection (5) of Section 30 of the CJA ‘must enter the reasons for the decision on the record of the proceedings.’<sup>1057</sup>

### **6.5.5 Assessment of Offending Children**

Another progressive element of the CJA is its emphasis on assessment of a child who comes into conflict with the law. The duty to conduct an assessment on every child who is alleged to have committed an offence is placed on a probation officer, unless assessment has been dispensed with in terms of Section 41(3).<sup>1058</sup> In terms of subsection (2) of Section 34, a probation officer who has been notified by a police official that a child has been handed a written notice, served with a summons or arrested, ‘must assess’<sup>1059</sup> the child before the child appears at a preliminary inquiry

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<sup>1055</sup> Ibid, Section 30(4).

<sup>1056</sup> Ibid, Section 30(5)(a).

<sup>1057</sup> Ibid, Section 30(5)(b).

<sup>1058</sup> Ibid, Section 34(1).

<sup>1059</sup> Section 37 (1) provides that:

within the time periods provided for in Section 43(3)(b).’ According to the provisions of Section 43(3)(b), a preliminary inquiry referred to in paragraph (a) must be held within 48 hours of arrest as provided for in Section 20(5) if a child is arrested and remains in detention; or within the time periods specified in a written notice in terms of Section 18 or a summons in terms of Section 19. Otherwise, a probation officer who has been notified by a police official that a child under the age of 10 years has been dealt with in terms of Section 9 ‘must make arrangements to assess the child within seven days of the notification.’<sup>1060</sup>

The law imposes mandatory duties on a probation officer when conducting the assessment of child accused of committing an offence. Such duties include explaining the purpose of the assessment to the child<sup>1061</sup>; informing the child of his or her rights in the prescribed manner<sup>1062</sup>; explaining to the child the immediate procedures to be followed<sup>1063</sup>; and inquiring from the child whether or not he or she intends to acknowledge responsibility for the offence in question<sup>1064</sup>.

In addition, the probation officer may, at any stage during the assessment of a child, ‘consult with any person who may provide information necessary for the assessment,

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‘The assessment of a child may take place in any suitable place identified by the probation officer, which may include a room at a police station, a magistrate’s court, the offices of the Department of Social Development or a One-Stop Child Justice Centre.

(2) The place identified in terms of subsection (1) must, as far as possible, be conducive to privacy.’

<sup>1060</sup> Ibid, Section 34(3).

<sup>1061</sup> Ibid, Section 39(1)(a).

<sup>1062</sup> Ibid, Section 39(1)(b).

<sup>1063</sup> Ibid, Section 39(1)(c).

<sup>1064</sup> Ibid, Section 39(1)(d).

including a prosecutor, a police official or a diversion service provider.’<sup>1065</sup> The probation officer may also, at any stage during the assessment, consult privately with any person present;<sup>1066</sup> or he or she may consult any person who is not at the assessment and who has any information relating to the assessment; but if additional information is obtained, the child must be informed accordingly.<sup>1067</sup>

In case a child is accused with another child or other children, the probation officer ‘may conduct the assessment of the children simultaneously if this will be in the best interests of all the children concerned.’<sup>1068</sup> During the assessment the probation officer ‘must encourage the participation of the child.’<sup>1069</sup>

#### **(a) The Purpose of Assessment of Offending Children**

The purpose of conducting assessment of a child who is accused of committing an offence is stipulated in Section 35 of the CJA, which strives to achieve the goals below. First, to establish whether a child may be in need of care and protection in order to refer the child to a children’s court in terms of Section 50 or Section 64 of the CJA. Second, to estimate the age of the child if the age is uncertain. Third, to gather information relating to any previous conviction, previous diversion or pending charge in respect of the child. Fourth, to formulate recommendations regarding the release or detention and placement of the child. Fifth, it strives to achieve: where appropriate, establish the prospects for diversion of the matter.

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<sup>1065</sup> Ibid, Section 39(2).

<sup>1066</sup> Ibid, Section 39(3).

<sup>1067</sup> Ibid, Section 39(4).

<sup>1068</sup> Ibid, Section 39(5).

<sup>1069</sup> Ibid, Section 39(6).

Sixth, in the case of a child under the age of 10 years or a child referred to in Section 10(2)(b), it strives to establish what measures need to be taken in terms of Section 9. Seventh, in the case of a child who is 10 years or older but under the age of 14 years, it seeks to express a view on whether expert evidence referred to in Section 11(3) would be required. Eighth, to determine whether the child has been used by an adult to commit the crime in question. Ninth, to provide any other relevant information regarding the child which the probation officer may regard to be in the best interests of the child or which may further any objective which the CJA intends to achieve.

#### **(b) Confidentiality of Information Obtained at Assessment**

The CJA emphasises that any information obtained at an assessment is confidential.<sup>1070</sup> The law also emphasises that such information may only be used for any purpose authorized by the CJA, including at a preliminary inquiry<sup>1071</sup>; and it is inadmissible as evidence during any bail application, plea, trial or sentencing proceedings in which the child appears.<sup>1072</sup> Any person who contravenes these provisions ‘is guilty of an offence and, if convicted, liable to a fine or to imprisonment for a period not exceeding three months.’<sup>1073</sup>

#### **(c) Persons who can Attend at the Assessment Session**

The law is very categorical on the categories of persons who are allowed to attend the assessment session. Under Section 38(1) of the CJA it is mandatory that the child who is accused of committing an offence must be present at his or her assessment.

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<sup>1070</sup> Ibid, Section 36(1).

<sup>1071</sup> Ibid, Section 36(1)(a).

<sup>1072</sup> Ibid, Section 36(1)(b).

<sup>1073</sup> Ibid, Section 36(2).

The second category of persons obliged to be present during the assessment is the child's parent or an appropriate adult or a guardian. The child's parent or an appropriate adult or a guardian of the child may, however, not be present at the assessment if he or she has been exempted by the probation officer from attending; or excluded by the probation officer from attending because he or she has disrupted, undermined or obstructed the assessment or it is in the best interests of the child or the administration of justice.<sup>1074</sup>

In addition, the probation officer may permit the following persons to attend an assessment: a diversion service provider<sup>1075</sup>; a researcher<sup>1076</sup>; or any other person whose presence is necessary or desirable for the assessment.<sup>1077</sup> If there is any risk that the child may escape or endanger the safety of the probation officer or any other person, the probation officer may request a police official to be present at an assessment.<sup>1078</sup>

In terms of subsection (5) of Section 38 of the CJA, a probation officer may, where appropriate, 'elicit the views of the child in private regarding the presence of any person who is attending the assessment.' A probation officer 'must make every effort to locate a parent or an appropriate adult or a guardian in order to conclude the assessment of a child and may request a police official to assist in the location of that person.'<sup>1079</sup> Nonetheless, the probation officer may conclude the assessment of a child in the absence of a parent, appropriate adult or guardian 'if all reasonable

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<sup>1074</sup> Ibid, Section 38(2).

<sup>1075</sup> Ibid, Section 38(3)(a).

<sup>1076</sup> Ibid, Section 38(3)(a).

<sup>1077</sup> Ibid, Section 38(3)(a).

<sup>1078</sup> Ibid, Section 38(4).

<sup>1079</sup> Ibid, Section 38(6)(a).

efforts to locate that person have failed or if that person has been notified of the assessment and has failed to attend.<sup>1080</sup>

#### **(d) The Assessment Report of a Probation Officer**

Under the provisions of Section 40 of the CJA the probation officer is obliged to complete an assessment report in the prescribed manner with recommendations. The recommendations should canvass the issues below, where applicable. First, the possible referral of the matter to a children's court in terms of Section 50 or 64 of the CJA. Second, the appropriateness of diversion, including a particular diversion service provider, or a particular diversion option or options, as provided for in Section 53. Third, the possible release of the child into the care of a parent, an appropriate adult or guardian or on his or her own recognisance, in terms of section 24. Fourth, if it is likely that the child could be detained after the first appearance at the preliminary inquiry, the placement of the child in a specified CYCC or prison in terms of Section 29 or Section 30. Fifth, in the case of a child under the age of 10 years, establish what measures need to be taken in terms of Section 9. Sixth, the possible criminal capacity of the child if the child is 10 years or older but under the age of 14 years, as provided for in Section 10, as well as measures to be taken in order to prove criminal capacity. Seventh, whether a further and more detailed assessment of the child is required in order to consider the circumstances referred to in subsection (3) of Section 40 of the CJA. Eighth, an estimation of the age of the child if this is uncertain, as provided for in Section 13.<sup>1081</sup>

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<sup>1080</sup> Ibid, Section 38(6)(a).

<sup>1081</sup> Ibid, Section 40(1).



Where a recommendation relates to the placement of the child in a CYCC, referred to in subsection (1)(d) above, it must be supported by current and reliable information in a prescribed form, obtained by the probation officer from the functionary responsible for the management of the CYCC regarding the availability or otherwise of accommodation for the child in question<sup>1082</sup>; and the level of security, amenities and features of the CYCC.<sup>1083</sup> In principle, a recommendation referred to in subsection (1)(g) of Section 40 of the CJA, may be made in one or more of the following circumstances: the possibility that the child may be a danger to others or to himself or herself; the fact that the child has a history of repeatedly committing offences or absconding; where the social welfare history of the child warrants a further assessment; and the possibility that the child may be admitted to a sexual offenders' programme, substance abuse programme or other intensive treatment programme.<sup>1084</sup>

In the assessment report the probation officer must indicate whether or not the child intends to acknowledge responsibility for the alleged offence.<sup>1085</sup> This report 'must be submitted to the prosecutor before the commencement of a preliminary inquiry, with due regard to the time periods referred to in Section 43(3)(b).'<sup>1086</sup>

#### **6.5.6 Diversion**

Diversion is a central pillar of a modern child's rights-oriented juvenile justice system; and 'the extent to which a juvenile justice system incorporates diversion both

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<sup>1082</sup> Ibid, Section 40(2)(a).

<sup>1083</sup> Ibid, Section 40(2)(b).

<sup>1084</sup> Ibid, Section 40(3).

<sup>1085</sup> Ibid, Section 40(4).

<sup>1086</sup> Ibid, Section 40(5).

in legislation and practice is one pointer to the system's adherence to children's rights.<sup>1087</sup> Prof Jap Doek argues that: 'Although there are encouraging steps in a number of countries to develop measures with a view to divert the cases from the traditional criminal procedures ... there are still too many States Parties that have taken very little or no action in this regard.'<sup>1088</sup> He further argues that in addition, and when judicial proceedings have been initiated, 'there are often no or very few effective alternatives for the traditional sanctions - in particular the deprivation of liberty.'<sup>1089</sup> However, writing before the Bill for the enactment of the CJA, Prof Doek noted that:

The Bill has to be commended for the very strong emphasis on diversion and alternatives to deprivation of liberty, although there does not seem to be a clear distinction between diversion as a measure to avoid judicial proceedings and measures available during the trial (also called diversion) that do not actually divert the case but present alternatives for traditional sanctions. However, the provisions for diversion are detailed and meet international standards. Nevertheless, I still wonder whether it is necessary and what would be the reason of having three levels of diversion?<sup>1090</sup>

In conventional criminal procedure there are three opportunities for action by three different role-players in the diversion process: the police, the prosecutor and the court. Within a wide-ranging diversion policy the police can, and should, play a crucial role when the child 'has first contact with the police [where] the judicial proceedings have not yet been initiated. In other words, there is the possibility that

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<sup>1087</sup> Odongo, G.O., "The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context", *op. cit.*, p. 191.

<sup>1088</sup> Doek, J., "Child Justice Trends and Concerns with a Reflection on South Africa", *op. cit.*, p. 14. In the terminology of the CRC, Article 40(3)(b) these are 'measures for dealing with such children without resorting to judicial proceedings'.

<sup>1089</sup> Doek, *ibid.*, p. 14.

<sup>1090</sup> *Ibid.*, pp. 14-5.

the police may issue an informal warning. There is not enough attention paid to the role of the police in the diversion process.’<sup>1091</sup>

In this section we, thus, examine the law and practice of diversion in South Africa. We commence this discussion by looking at the definition and origins of diversion and its entrenchment in the South African criminal justice system.

#### **6.5.6.1 Definition of Diversion in Criminal Justice**

Diversion has been defined as the election – in suitable and deserving cases – ‘of a manner of disposal of a criminal case other than through normal court proceedings.’

<sup>1092</sup> Viewed in this nous, diversion usually ‘implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in particular programs and/or makes reparation to the complainant. Diversion is preferable to the mere withdrawal of cases as the offender is charged with taking responsibility for his or her actions.’<sup>1093</sup>

#### **6.5.6.2 Definition of Diversion in Juvenile Justice**

In relation to juvenile justice, diversion refers to ‘programmes and practices which are employed for young people who have initial contact with the police, but are diverted from traditional juvenile justice processes before children’s court

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<sup>1091</sup> Ibid, p. 15.

<sup>1092</sup> Part 7 of the Prosecution Policy of the South African National Prosecuting Authority. See also Anderson, A.M., “Restorative Justice, the African Philosophy of *Ubuntu* and the Diversion of Criminal Prosecution.” An unpublished paper (on file).

<sup>1093</sup> Anderson, *ibid*.

adjudication.’<sup>1094</sup> In broad sense, diversion has been defined as entailing ‘strategies developed in the youth justice system to prevent young people from committing crime or to ensure that they avoid formal court action and custody if they are arrested and prosecuted’.<sup>1095</sup> In Odongo’s view, this definition is so broad as to include preventative programmes in relation to child offending.<sup>1096</sup> It has, therefore, been observed that ‘diversion can incorporate a variety of strategies from school-based crime prevention programmes through to community based programmes used as an alternative to custody.’<sup>1097</sup> Odongo argues that,

Although pre-trial diversion represents the earliest stage at which child offenders may be channelled away from the formal criminal justice process, diversion may occur at any stage. In most juvenile justice systems in Africa, the use of diversion remains a relatively new concept, though different forms of diversion became an integral part of juvenile justice systems in most Western countries from the 1970s.<sup>1098</sup>

Being one of a few child justice centred laws enacted in Sub-Saharan Africa, the CJA incorporates comprehensive provisions relating to diversion of child offenders away from the juvenile justice system at all stages of the process. However, before we traverse on the salient features of the diversion provisions in this law, we first set out a brief background to diversion in South Africa.

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<sup>1094</sup> Polk, K., “Juvenile Diversion in Australia: A National Review”. Unpublished paper presented at the conference on *Juvenile Justice: From Lessons of the Past to a Roadmap for the Future*, convened by the Australian Institute of Criminology in conjunction with the New South Wales Department of Juvenile Justice, Sydney, 1-2 December 2003.

<sup>1095</sup> Muncie, J., *Youth and Crime: A Critical Introduction*. London: Sage, 1999, p. 305. See also Wood, C., *Diversion in South Africa: A Review of Policy and Practice, 1990-2000*. Pretoria: Institute for Security Studies (ISS) Paper 79, 2003, p. 1.

<sup>1096</sup> Odongo, G.O., “The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context”, op. cit, p. 192.

<sup>1097</sup> Ibid. See also Wood, C., *Diversion in South Africa: A Review of Policy and Practice, 1990-2003*. Pretoria: Institute of Security Studies, Occasional Paper, 2003.

<sup>1098</sup> Odongo, G.O., ‘The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context’, op. cit, pp. 152-3. See also Sarre, R., “Deconstructing and Criminal Justice Reforms: Rescuing Diversion Ideas from the Waste Paper Basket.” *Current Issues in Criminal Justice*, Vol. 10 No. 3, 1999, p. 259.

### 6.5.6.3 Introduction of Diversion in the Juvenile Justice System in South Africa

Diversion services in South Africa have been offered since the beginning of the 1990s,<sup>1099</sup> although the first attempt to incorporate diversion in an official document was through the inclusion of recommendations on diversion in the Interim Policy Recommendations of the IMC.<sup>1100</sup> Therefore, the Interim Policy Recommendations was the first government document to formally acknowledge the limited availability of diversion programmes and the unequal access to these programmes.<sup>1101</sup> In order to cure this state of affairs, the IMC recommended that an effective referral process be developed; that diversion should be offered at a range of levels<sup>1102</sup>; and that a new diversion option, family group conferencing, should be piloted.<sup>1103</sup>

As Sloth-Nielsen<sup>1104</sup> contends, an issue paper,<sup>1105</sup> a discussion paper,<sup>1106</sup> and a report<sup>1107</sup> of a project committee of the South African Law Reform Commission to

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<sup>1099</sup> See Wood, C., *Diversion in South Africa: A Review of Policy and Practice 1990-2003*, op. cit. The process began in early 1990s as a result of the establishment of the Youth Empowerment Scheme Programme ("Yes" programme) by the National Institute for Crime Prevention and Reintegration of Offenders (NICRO). See, for instance, Gallinetti, J., "Diversion." In Sloth-Nielsen, J. and J. Gallinetti (eds.), *Child Justice in Africa: A Good Guide to Good Practice*. Bellville: Community Law Centre, 2005; and Sloth-Nielsen, J., "Child Justice and Law Reform." In Davel, C.J. (ed.), *Introduction to Child Law in South Africa*. Pretoria: Juta Law, 2000, pp. 418-428.

<sup>1100</sup> IMC Interim Policy Recommendations 1996 40-47. However, it should be noted that under international law, the CRC under Article 40(3)(b) enshrines, for the first time, the desirability of the development of diversion for child justice systems. Diversion is also the subject of rule 11 of the Beijing Rules for. Previous academic publications or working papers on diversion in the South African context existed before the IMC (for instance, The Drafting Consultancy 1994). For further discussion, also see Sloth-Nielsen, J. "A Short History of Time: Charting the Contribution of Social Development Service Delivery to Enhance Child Justice 1996 – 2006". In Gallinetti, J. et al (eds.), *Child Justice in South Africa: Children's Rights under Construction*. Newlands/Cape Town: Open Society Foundation for South Africa and Child Justice Alliance, 2006, p. 26.

<sup>1101</sup> Ibid. See also Julia, Sloth-Nielsen and J. Gallinetti, "Just Say Sorry?" *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008", op. cit.

<sup>1102</sup> Sloth-Nielsen, J., ibid, p. 26.

<sup>1103</sup> Sloth-Nielsen, J., "The Juvenile Justice Law Reform Process in South Africa: Can a Children's Rights Approach carry the Day?" *Quinnipiac Law Review*. Vol. 18, 1999. pp. 469-489. See also Wood, op. cit.

<sup>1104</sup> Sloth-Nielsen, J., "A Short History of Time: Charting the Contribution of Social Development Service Delivery to Enhance Child Justice 1996 – 2006", op. cit.

draft proposals for a child system followed closely on the recommendations of the Inter-Ministerial Committee (the IMC) in proposing for legislative inclusion of diversion.<sup>1108</sup>

Then, diversion was an ever expanding and diversifying field, ‘even in the absence of a legislative base.’<sup>1109</sup> The fact that tens of thousands of South African children access diversion every year ‘is a substantial achievement in a very short period of time. The provincial Departments of Social Development have supported, mainstreamed and diversified diversion services to the extent that implementation of Article 40(3)(b) of the CRC is a signal characteristic of child justice service in South Africa.’<sup>1110</sup>

#### 6.5.6.4 Categories of Diversion

In compliance with international law on diversion<sup>1111</sup>, the CJA has provisions for diversion implemented at a three-tier level in the juvenile justice system<sup>1112</sup>: there is

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<sup>1105</sup> SA Law Commission *Issue Paper*. Vol. 54 No 9, *Juvenile Justice*. May 1997.

<sup>1106</sup> SA Law Commission *Discussion Paper*. Vol. 55 No 79. *Juvenile Justice*. December 1998.

<sup>1107</sup> SA Law Commission *Discussion Report*. Vol. 56, 2000.

<sup>1108</sup> Sloth-Nielsen, J., “Child Justice and Law Reform”, op. cit.

<sup>1109</sup> Sloth-Nielsen, J., “A Short History of Time: Charting the Contribution of Social Development Service Delivery to Enhance Child Justice 1996 – 2006”, op. cit.

<sup>1110</sup> Ibid.

<sup>1111</sup> Article 40(3)(b) of the CRC obliges States Parties to ensure that diversion is part and parcel of their criminal justice systems.

<sup>1112</sup> As Sloth-Nielsen and Gallinetti argue, the idea of dividing the diversion options into different levels originated in the SALRC draft of the Bill. According to them: ‘The three levels signified diversion responses differing in proportion in relation to the seriousness of the offence, and depending on whether or not the child had previously been a beneficiary of diversion. Each level of options is linked to the Schedules listing the applicable offences. During the parliamentary process, the number of levels was reduced from three to two in an effort to simplify the system.’ See Julia, Sloth-Nielsen and J. Gallinetti, “Just Say Sorry?” *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008”, op. cit. p. 75 (note 39).

the pre-trial forum in the form of preliminary inquiry;<sup>1113</sup> diversion at the prosecution and sentencing stages; and diversion through resort to restorative justice. The three stages of diversion in South Africa are examined below.

#### **(a) Diversion at the Preliminary Inquiry**

Diversion held at the preliminary inquiry takes at the pre-trial stage with the aim of determining, *inter alia*, how to best deal with individual cases of children, whereby consideration for diversion is an express objective.<sup>1114</sup> This is an informal pre-trial procedure which is inquisitorial in nature<sup>1115</sup>; and may be held in a court or any other suitable place.<sup>1116</sup> In a way,

The preliminary inquiry is expected to strengthen referral procedures for diversion by involving role-players (such as social workers, judicial officers and police) other than the prosecutor alone. [This ensures] the development of and growth of pre-trial diversion and assure[s] more uniformity in the process of referral.<sup>1117</sup>

Under Section 43(2) of the CJA, the preliminary inquiry aims, *inter alia*, at establishing whether or not the matter can be diverted before plea; and identifying a suitable diversion option, where applicable. In principle, the preliminary inquiry must be held within 48 hours of arrest as provided for in Section 20(5) if a child is arrested and remains in detention; or within the time periods specified in a written notice in terms of section 18<sup>1118</sup> or a summons in terms of section 19.<sup>1119</sup>

#### **(b) Diversion at the Prosecution and Sentencing Levels**

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<sup>1113</sup> See particularly Chapter 7 (Sections 43-50) of the CJA.

<sup>1114</sup> Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit, pp. 155.

<sup>1115</sup> See section 47 of the CJA.

<sup>1116</sup> Ibid. Section 43(1).

<sup>1117</sup> Odongo, G.O., 'The Impact of International Law on Children's Rights on Juvenile Justice Law Reform in the African Context', op. cit.

<sup>1118</sup> Dealing with written notice to appear at preliminary inquiry.

<sup>1119</sup> Dealing with summons.

The second level of diversion is an array of diversion opportunities at the different levels of the juvenile justice process that encourage the ‘development of innovative diversion practices which need not be cost intensive.’<sup>1120</sup> These kinds of innovations in the diversion of juvenile offenders away from the juvenile justice system in South Africa can be carried out through a wider access to diversion at the different levels of the juvenile justice system: from the police arrest and prosecution<sup>1121</sup> to the sentencing<sup>1122</sup> levels.<sup>1123</sup>

Diversion at this stage is made ‘after consideration of all relevant information presented at a preliminary inquiry, or during a trial, including whether the child has a record of previous diversions.’<sup>1124</sup> In addition diversion will be considered for diversion if-

- (a) the child acknowledges responsibility for the offence;

<sup>1120</sup> Odongo, G.O., ‘The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context’, op. cit.

<sup>1121</sup> See particularly Sections 41, 42, 52, 53 and 97 of the CJA. Section 42(1) states that if a matter is diverted in terms of section 41, the child and, where possible, his or her parent, appropriate adult or guardian ‘must appear before a magistrate in chambers, in order to have the diversion option that has been selected by the prosecutor, made an order of court.’

<sup>1122</sup> See particular Chapter 8 (Sections 51-62) of the CJA.

<sup>1123</sup> The objectives of diversion carried out by the court, as comprehensively set out in Section 51 of the CJA, are to:

- ‘(a) deal with a child outside the formal criminal justice system in appropriate cases;
- (b) encourage the child to be accountable for the harm caused by him or her;
- (c) meet the particular needs of the individual child;
- (d) promote the reintegration of the child into his or her family and community;
- (e) provide an opportunity to those affected by the harm to express their views on its impact on them;
- (f) encourage the rendering to the victim of some symbolic benefit or the delivery of some object as compensation for the harm;
- (g) promote reconciliation between the child and the person or community affected by the harm caused by the child;
- (h) prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system;
- (i) reduce the potential for re-offending;
- (j) prevent the child from having a criminal record; and
- (k) promote the dignity and well-being of the child, and the development of his or her sense of self-worth and ability to contribute to society.’

<sup>1124</sup> Ibid, Section 52(1).



- (b) the child has not been unduly influenced to acknowledge responsibility;
- (c) there is a prima facie case against the child;
- (d) the child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion; and
- (e) the prosecutor indicates that the matter may be diverted in accordance with subsection (2) or the Director of Public Prosecutions indicates that the matter may be diverted in accordance with subsection (3).

The CJA also sets out two levels of diversions options. Under Section 53(2) level one applies to offences referred to in Schedule 1; and level two applies to all other offences as referred to in Schedules 2 and 3.<sup>1125</sup>

In level two diversion options include; first, the level one diversion options referred to in subsection (3)(j) to (q) above. Second, compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose, which

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<sup>1125</sup> In level one diversion options include:

- ‘(a) an oral or written apology to a specified person or persons or institution;
- (b) a formal caution, with or without conditions;
- (c) placement under a supervision and guidance order;
- (d) placement under a reporting order;
- (e) a compulsory school attendance order;
- (f) a family time order;
- (g) a peer association order;
- (h) a good behaviour order;
- (i) an order prohibiting the child from visiting, frequenting or appearing at a specified place;
- (j) referral to counselling or therapy;
- (k) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose;
- (l) symbolic restitution to a specified person, persons, group of persons or community, charity or welfare organisation or institution;
- (m) restitution of a specified object to a specified victim or victims of the alleged offence where the object concerned can be returned or restored;
- (n) community service under the supervision or control of an organisation or institution, or a specified person, persons or group of persons identified by the probation officer;
- (o) provision of some service or benefit by the child to a specified victim or victims;
- (p) payment of compensation to a specified person, persons, group of persons or community, charity or welfare organisation or institution where the child or his or her family is able to afford this; and
- (q) where there is no identifiable person, persons or group of persons to whom restitution or compensation can be made, provision of some service or benefit or payment of compensation to a community, charity or welfare organisation or institution.<sup>1125,</sup>

may include a period or periods of temporary residence. Third, referral to intensive therapy to treat or manage problems that have been identified as a cause of the child coming into conflict with the law, which may include a period or periods of temporary residence. Fourth, placement under the supervision of a probation officer on conditions which may include restriction of the child's movement outside the magisterial district in which the child usually resides without the prior written approval of the probation officer.<sup>1126</sup>

In selection of diversion options, the following factors must be considered: first, the diversion option must be at the appropriate level in terms of Section 53. Second, the child's cultural, religious and linguistic background. Third, the child's educational level, cognitive ability and domestic and environmental circumstances. Fourth, the proportionality of the option recommended or selected, to the circumstances of the child, the nature of the offence and the interests of society. Fifth, the child's age and developmental needs.<sup>1127</sup> The CJA also, in a very progressive way, provides for minimum standards applicable to diversion, which 'must be structured in a way so as to strike a balance between the circumstances of the child, the nature of the offence and the interests of society',<sup>1128</sup> provided that such standards 'may not be exploitative, harmful or hazardous to the child's physical or mental health';<sup>1129</sup> and

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<sup>1126</sup> Ibid, Section 53(4).

<sup>1127</sup> Ibid, Section 54(1). In terms of subsection (2)(a) of Section 54, 'In the case of an offence referred to in Schedule 1, level one diversion options set out in Section 53(3) are applicable and may be used in combination.' In the case of an offence referred to in Schedule 2 or 3, 'level two diversion options set out in Section 53(4) are applicable and may be used in combination, together with any one or more level one diversion options, where appropriate.' Section 54(2).

<sup>1128</sup> Ibid, Section 55(1).

<sup>1129</sup> Ibid, Section 55(1)(a).

‘may not interfere with the child’s schooling.’<sup>1130</sup> The standards also ‘must be appropriate to the age and maturity of the child.’<sup>1131</sup> Furthermore, the standards ‘may not be structured in a manner that completely excludes certain children due to a lack of resources, financial or otherwise.’<sup>1132</sup> The standards ‘must be sensitive to the circumstances of the victim.’<sup>1133</sup>

In terms of subsection (2) of Section 54, the CJA sets out the expected outcomes diversion programmes must yield to. It categorically states that, where reasonably possible, the programmes: first, impart useful skills; second, must include a restorative justice element which aims at healing relationships, including the relationship with the victim; third, must include an element which seeks to ensure that the child understands the impact of his or her behaviour on others, including the victims of the offence, and may include compensation or restitution; fourth, must be presented in a location reasonably accessible to the child; fifth, must be structured in a way that they are suitable to be used in a variety of circumstances and for a variety of offences; sixth, must be structured in a way that their effectiveness can be measured; seventh, must be promoted and developed with a view to equal application and access throughout the country, bearing in mind the special needs and circumstances of children in rural areas and vulnerable groups; and, eighth, must involve parents, appropriate adults or guardians, if applicable.

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<sup>1130</sup> Ibid, Section 55(1)(c).

<sup>1131</sup> Ibid, Section 55(1)(b).

<sup>1132</sup> Ibid, Section 55(1)(d).

<sup>1133</sup> Ibid, Section 55(1)(e).

The law also sets out criteria for provision and accreditation of diversion programmes and diversion service providers. In this regard, a prosecutor, an inquiry magistrate or a child justice court ‘may only refer a matter for diversion to a diversion programme and diversion service provider that has been accredited in terms of this section and has a valid certificate of accreditation, referred to in subsection (2)(e).’<sup>1134</sup> The law also obliges the Cabinet member [minister] responsible for social development, in consultation with the Cabinet members responsible for the administration of justice, education, correctional services, safety and security and health: first, create a policy framework to develop the capacity within all levels of Government and the non-governmental sector to establish, maintain and develop programmes for diversion; second, to establish and maintain a system for accreditation, as prescribed, of programmes for diversion and diversion service providers<sup>1135</sup>; and, third, ensure the availability of resources to implement diversion programmes, as prescribed.<sup>1136</sup> The CJA does progressively provide for monitoring of compliance with diversion order, which is done by a probation officer

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<sup>1134</sup> Ibid, Section 56 (1). This requirement is, however, subject to Section 98(2), which provides that: ‘Every diversion programme and diversion service provider which existed at the time of the commencement of this Act may continue to operate until it has been informed of the decision in respect of its application as provided for in Section 56(2)(c)(iii).’

<sup>1135</sup> Under subsection (2)(b) of Section 56, this system for accreditation must contain—

- ‘(i) criteria for the evaluation of diversion programmes to ensure that they comply with the minimum standards referred to in Section 55;
- (ii) criteria for the evaluation of the content of diversion programmes to ensure that they reflect a meaningful and adequate response to the harm caused by offences committed by children, to achieve the objectives of diversion;
- (iii) mechanisms to monitor diversion programmes and diversion service providers in respect of their ability to render quality service in achieving the objectives of diversion and their ability to promote compliance with diversion orders;
- (iv) measures for the removal of diversion programmes and diversion service providers from the system, where appropriate.’

<sup>1136</sup> Ibid, Section 56(2)(a).

identified in a diversion order.<sup>1137</sup> It also provides for penalty for non-compliance with the diversion order.<sup>1138</sup> Under Section 58(1), where a child fails to comply with any diversion order, the magistrate<sup>1139</sup>, the inquiry magistrate or child justice court may, on being notified of the failure, ‘issue a warrant for the arrest of the child or cause a summons to be issued in respect of the child in terms of Section 19, to appear before the magistrate, inquiry magistrate or child justice court.’ Such magistrate, inquiry magistrate or child justice court ‘must inquire into the reasons for the child’s failure to comply with the diversion order and make a determination whether or not the failure is due to the child’s fault’<sup>1140</sup>; and if it is found that the failure is not due to the child’s fault, the magistrate, inquiry magistrate or child justice court may continue with the same diversion option with or without altered conditions; add or apply any other diversion option; or make an appropriate order which will assist the child and his or her family to comply with the diversion option initially applied, with or without altered or additional conditions.<sup>1141</sup>

If it is found that the failure is due to the child’s fault the following actions may be taken: first the prosecutor, in the case where the matter was diverted by a prosecutor in terms of Section 41(1) or at a preliminary inquiry in terms of Section 49(1), may decide to proceed with the prosecution, in which case Section 49(2) applies with the

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<sup>1137</sup> Ibid, Section 57(1). In terms of subsection (2) of Section 57: ‘If a child fails to comply with the diversion order, the probation officer or person identified in terms of subsection (1) must, in the prescribed manner, notify the magistrate, inquiry magistrate or child justice court in writing of the failure.’

<sup>1138</sup> Ibid. Section 58.

<sup>1139</sup> Referred to in Section 42, *ibid*.

<sup>1140</sup> Ibid, Section 58(2).

<sup>1141</sup> Ibid, Section 58(3).

changes required by the context.<sup>1142</sup> Or, the child justice court, in the case where the matter was diverted by the court in terms of Section 67, may record the acknowledgement of responsibility made by the child as an admission referred to in Section 220 of the Criminal Procedure Act and proceed with the trial.<sup>1143</sup> Or, the prosecutor or child justice court must, where the matter does not go to trial, decide on another diversion option which is more onerous than the diversion option originally decided on.<sup>1144</sup>

In a very progressive manner, Section 59 of the CJA sets out the legal consequences of diversion. The section provides that if a matter has been diverted and the diversion order has been successfully complied with, a prosecution on the same facts may not be instituted.<sup>1145</sup> This happens where diversion has been undertaken by a prosecutor in terms of Chapter 6<sup>1146</sup>, at a preliminary inquiry in terms of Chapter 7<sup>1147</sup> or by a child justice court in terms of Chapter 9<sup>1148</sup>. In addition, the section provides that a private prosecution in terms of Section 7 of the Criminal Procedure Act ‘may not be instituted against a child in respect of whom the matter has been diverted in terms of this Act.’<sup>1149</sup>

### **(c) Diversion through Restorative Justice Practices**

The third level of diversion is through resort to restorative justice practices such as family group conferences and victim-offender mediation. These practices, ‘while

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<sup>1142</sup> Ibid, Section 58(4)(a).

<sup>1143</sup> Ibid, Section 58(4)(b).

<sup>1144</sup> Ibid, Section 58(4)(c).

<sup>1145</sup> Ibid, Section 59(1)(a).

<sup>1146</sup> Dealing with diversion by prosecutor in respect of minor offences.

<sup>1147</sup> Dealing with preliminary inquiry.

<sup>1148</sup> Dealing with trial in Child Justice Courts.

<sup>1149</sup> Ibid, Section 59(2).

drawing from practices in Western juvenile justice systems, resonate with African concepts of restorative justice and reconciliation.<sup>1150</sup> In terms of Section 61(1)(a) of the CJA, a family group conference is an informal procedure which is intended ‘to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons and, attended by persons referred to in subsection (3)(b), at which a plan is developed on how the child will redress the effects of the offence.’ It may only take place if both the victim and the child consent.<sup>1151</sup> The Act further provides that:

(2) If a child has been ordered to appear at a family group conference, a probation officer appointed by the magistrate referred to in section 42, an inquiry magistrate or a child justice court must, within 21 days after the order<sup>1152</sup>, convene the conference by—

- (a) setting the date, time and place of the conference; and
- (b) taking steps to ensure that all persons who may attend the conference are timeously notified of the date, time and place of the conference.<sup>1153</sup>

The family group conference must be facilitated by a family group conference facilitator, who may be a probation officer or a diversion service provider referred to in Section 56(1).<sup>1154</sup> The conference may be attended by the following persons: first, the child and his or her parent, an appropriate adult or a guardian; second, any person requested by the child; third, the victim of the alleged offence, his or her parent, an appropriate adult or a guardian, where applicable, and any other support person of the victim’s choice; and fourth, the probation officer, if he or she is not the family group conference facilitator. Fifth, the prosecutor; sixth, any police official; seventh,

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<sup>1150</sup> Odongo, G.O., “The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context”, op. cit, p. 155.

<sup>1151</sup> Section 61(1)(b) of the CJA.

<sup>1152</sup> According to subsection (4) of Section 61: ‘If a family group conference fails to take place on the date and at the time and place set for the conference, the probation officer must convene another conference, as provided for in this section, within 21 days from the date on which it was to take place.’

<sup>1153</sup> Ibid, Section 61(2).

<sup>1154</sup> Ibid, Section 61(3)(a).

a member of the community in which the child normally resides, as determined by the family group conference facilitator; and, eighth, any person authorised by the family group conference facilitator to attend the conference.<sup>1155</sup>

Participants in a family group conference must follow the procedure agreed on by them and may agree to a plan in respect of the child<sup>1156</sup>, which may include the application of any option contained in Section 53(3); or any other action appropriate to the child, his or her family and local circumstances, which is consistent with the principles contained in the CJA.<sup>1157</sup> The plan must specify the objectives for the child and the period within which they are to be achieved; and it should contain details of the services and assistance to be provided to the child and a parent, an appropriate adult or a guardian. The plan must also specify the persons or organisations to provide the required services and assistance; and state the responsibilities of the child and of the child's parent, an appropriate adult or a guardian. It must state personal objectives for the child and for the child's parent, an appropriate adult or a guardian. The plan further must include any other matters relating to the education, employment, recreation and welfare of the child as are relevant; and must include a mechanism to monitor the plan.<sup>1158</sup>

The family group conference facilitator 'must record the details of and reasons for any plan agreed to at the family group conference and must furnish a copy of the record to the child and to the probation officer or person referred to in Section

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<sup>1155</sup> Ibid, Section 61(3)(b).

<sup>1156</sup> Ibid, Section 61(5).

<sup>1157</sup> Ibid, Section 61(6)(a).

<sup>1158</sup> Ibid, Section 61(6)(b).



57(1).<sup>1159</sup> In the event of the conference not taking place or the child failing to comply with the plan agreed to at the family group conference, the probation officer or person ‘must notify the magistrate, inquiry magistrate or child justice court in writing of the failure, in which case Section 58 applies.’<sup>1160</sup> If the participants in a family group conference cannot agree on a plan, the conference ‘must be closed and the probation officer must refer the matter back to the magistrate, inquiry magistrate or child justice court for consideration of another diversion option.’<sup>1161</sup> It is the law that no information furnished by the child at a family group conference may be used in any subsequent criminal proceedings arising from the same facts.<sup>1162</sup>

The practice of victim-offender mediation (VOM) is legally sanctioned under Section 62 of the CJA. In accordance with subsection (1)(a) of this section, a victim-offender mediation ‘means an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together at which a plan is developed on how the child will redress the effects of the offence.’ As with the family group conference, the VOM may only take place if both the victim and the child consent.<sup>1163</sup> Where a child has been ordered to appear at the VOM, Section 61(2), (4), (5), (6), (7), (8) and (9) will apply with the changes required by the context.<sup>1164</sup>

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<sup>1159</sup> Ibid, Section 61(7)(a).

<sup>1160</sup> Ibid, Section 61(7)(b).

<sup>1161</sup> Ibid, Section 61(8).

<sup>1162</sup> Ibid, Section 61(9).

<sup>1163</sup> Ibid, Section 62(1)(b).

<sup>1164</sup> Ibid, Section 62(2).

As is the case with the family group conference, a probation officer appointed by a magistrate referred to in Section 42, an inquiry magistrate or a child justice court must convene the victim-offender mediation.<sup>1165</sup> In principle, the VOM must be mediated by a probation officer or a diversion service provider referred to in Section 56(1), who or which may regulate the procedure to be followed at the mediation.<sup>1166</sup>

### 6.5.7 Sentencing

Sentencing refers to the final decision made by a criminal court in relation to the term of imprisonment (or otherwise) the accused person is liable to serve. It is normally made at the conclusion of criminal proceedings. It is significant to note at the outset that sentencing ‘is pre-eminently a matter for the discretion of the trial court.’<sup>1167</sup> The trial court’s discretion to hand down a certain type of sentence depends on ‘the seriousness and the nature of the crime, and also on whether the relevant legislation dictates a particular punishment for a crime.’<sup>1168</sup> It should also be noted that trial courts, regardless of their jurisdiction, are often guided by similar sentencing principles in deliberating over an appropriate sentence, which include retribution, deterrence, prevention and rehabilitation. In South Africa, these principles are guided by what has come to be referred to as the “*Zinn Triad*”: i.e., the

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<sup>1165</sup> Ibid, Section 62(3).

<sup>1166</sup> Ibid, Section 62(4).

<sup>1167</sup> See particularly *S v Pillay* 1977 (4) SA 531 (A) at 534H-535A; and *S v Frazzie* 1964 (4) SA 673 (A).

<sup>1168</sup> Tomkin, J., *Orphans of Justice: In Search of the Best Interests of the Child when a Parent is Imprisoned – A Legal Analysis*. Geneva: Quaker United Nations Office, 2009, p. 26.

crime in question; the personal circumstances of the offender; and the interests of the community at large.<sup>1169</sup>

However, where the trial court has failed ‘to exercise its discretion properly and judicially or at all, and thereby committing a material misdirection, an appeal court will be at large to interfere with the sentence.’<sup>1170</sup> It should also be noted that sentencing ‘is clearly the most difficult part of criminal proceedings. It involves a careful and dispassionate consideration of balancing the gravity of the offence, the interests of society and the personal circumstances of the offender<sup>1171</sup> not forgetting, the interest of the victim.’<sup>1172</sup>

In this section we, therefore, examine provisions relating to sentencing in the CJA. The discussion in this section revolves around the universal rationale of sentencing; the objectives of, and factors affecting, sentencing; and sentencing options in the CJA.

#### **6.5.7.1 The Universal Rationale for Sentencing**

For years, criminal justice has grappled with what should be the rationale ‘to serve as a guiding principle in sentencing.’<sup>1173</sup> For a long time around the world, ‘the public

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<sup>1169</sup> The *Zinn Triad* was developed in *S v Zinn* 1969 (2) SA 537 (A) and approved in the Supreme Court in *S v Malagas* 2001 (2) SA 1222 (SCA). In similar tone, the Irish Supreme Court held in *The People (DPP) v M.* [1994] 3 IR 306; [1994] I.L.R.M. 541, where it was held that the sentence must be appropriate to the gravity of the offence and the personal circumstances of the offender. In *R v Asia Salum and Another* (1986) TLR 12, the High Court of Tanzania held that: ‘In imposing sentence the court is required to take into consideration several factors; such as, the gravity of the offence, the record of the accused, his age and the interests of society and those of the accused.’ See also *Republic v Kidato Abudlla* [1973] L.R.T. 82.

<sup>1170</sup> *Fredericks v S* [2011] ZASCA 177.

<sup>1171</sup> *S v Zinn* 1969 (2) 537 (A) at 540 G.

<sup>1172</sup> *Fredericks v S*, op. cit.

<sup>1173</sup> Inciardi, J.A., *Criminal Justice*, op. cit, p. 424.

has alternated between revulsion at inhumane sentencing practices and prison conditions (denounced as “barbaric” and “uncivilized”) on the one hand and dissatisfaction with overly compassionate treatment (seen as “codling criminals”) on the other.<sup>1174</sup> Viewed in this context, the fate of convicted offenders ‘has repeatedly shifted according to prevailing values and current perceptions of danger and fear of crime.’<sup>1175</sup> Arising from this thinking are five competing schools of thoughts about the rationale of sentencing: retribution, vengeance, incapacitation, deterrence, and rehabilitation.<sup>1176</sup>

Today, therefore, international standards relating to criminal justice concerning sentencing have evolved and codified in many international human rights instruments. In relation to sentencing of children, the CRC and the Beijing Rules have set out minimum sentencing standards, premised around two important sets of standards: first, principles that should underpin and provide the aims of sentencing; and, second, principles that set out restrictions or prohibitions on sentencing that are to be imposed on children. Underlying this supposition, the CRC lays down the “principle of proportionality”, which requires that the administration of juvenile justice must aim at ensuring ‘that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.’<sup>1177</sup> In addition to this principle, is the principle enunciated in Article 37 of the CRC

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<sup>1174</sup> Ibid.

<sup>1175</sup> Ibid, pp. 424-5.

<sup>1176</sup> Ibid. In relation to sentencing of child offenders, these principles have been given wide due consideration by the South African Supreme Court of Appeal in *Fredericks v S* (2008/11) [2011] ZASCA 177 (29 September 2011). This case is discussed later in this section.

<sup>1177</sup> Article 40(4) of the CRC. See also General Comment No. 20, 2007; and Rule 17(1)(a) of the Beijing Rules.

restricting deprivation of liberty in respect of children to be used as a last resort and for the shortest appropriate period. This article also bars capital punishment<sup>1178</sup>, life imprisonment without a possibility of release, and any cruel, inhuman or degrading treatment or punishment.

Therefore, States Parties to the CRC are obliged to adopt sentencing policies that are in harmony with the foregoing principles. In compliance with this obligation, the CJA has incorporated provisions regulating sentencing of children found guilty of committing criminal offences in Chapter 10. In the discussion in the section below, we examine the law relating to sentencing in the CJA. However, before we discuss the sentencing process under the CJA, we provide a brief analysis of the guidelines on sentencing prevalent in South Africa prior to its enactment and operationalisation.

Before the CJA was enacted and became operational, there were, in addition to the Constitution, guidelines on sentencing which had been authoritatively laid down in case law.<sup>1179</sup> The first case to explicitly consider the principles relevant to sentencing of children in the context of the foregoing international law and in the new constitutional era in South Africa was *S v Z en Vier Sake*<sup>1180</sup>. In this case, five matters came before the High Court on review in which children in conflict with the law had been sentenced to suspended terms of imprisonment. Considering the

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<sup>1178</sup> The imposition of death sentence for children who commit offences is prohibited under Article 6(5) of the International Covenant on Civil and Political Rights (ICCPR) and Article 37(a) of the CRC. This rule is so universally practised and accepted, to the extent of reaching the level of *jus cogens*. See particularly Odongo, G.O., “The Impact of International Law on Children’s Rights on Juvenile Justice Law Reform in the African Context”, op. cit, p. 159.

<sup>1179</sup> Ballard, C., “Youthfulness and Sentencing Prior to the Operation of the Child Justice Act: A Case Review of *Fredericks v The State*.” *Article 40*, Vol. 14 No. 1, April 2012.

<sup>1180</sup> 1999(1) SACR 427 (E).

options and principles applicable to child offenders, the court laid down the following guidelines on sentencing of children:

- (a) diversion should be considered prior to trial and sentencing in appropriate cases;
- (b) age must be properly determined prior to sentencing;
- (c) a sentencing court must act dynamically to obtain full particulars about the accused's personality and personal circumstances;
- (d) a sentencing court must exercise its wide sentencing discretion sympathetically and imaginatively;
- (e) a sentencing court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided; and should bear in mind especially that: the younger the accused is, the less appropriate imprisonment will be; imprisonment is rarely appropriate in the case of a first offender; and short-term imprisonment is appropriate; and
- (f) a sentencing court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.<sup>1181</sup>

Subsequently, case law 'generally affirmed these guidelines and courts thus became receptive to the idea that a sentence should be responsive to the individualised needs of the child, and where possible, sentences of imprisonment should be avoided.'<sup>1182</sup> For instance, in *Ntaka v The State*<sup>1183</sup> the appellant, who was 17 years old at the time he committed the offence of rape, argued before the South African Supreme Court of

<sup>1181</sup> These principles are discussed in Ballard, C., op. cit, pp. 10-11.

<sup>1182</sup> Ibid, p. 10.

<sup>1183</sup> [2008] ZACSA 30, March 2008 (unreported).

Appeal (SCA) that the High Court, ‘in sentencing him to ten years imprisonment (of which four were conditionally suspended), had failed to investigate adequately the possibility of correctional supervision.’<sup>1184</sup> Although Judge Cameron (writing for the majority) found that, in the light of the gravity of the offence, ‘a prison sentence [was] unavoidable’; he held that the High Court sentence disregarded

... the youthfulness of the appellant when he committed the crime. It treats him too much like the adult when he was not when he raped his victim. *It may set him for ruin, while foreclosing the possibility, embodied in his youth, that he will still benefit from resocialisation and re-education. It fails to individualize the sentence with the emphasis on preparing him, as a child offender, for his return to society.* [Emphasis supplied].

Therefore, Judge Cameron reduced the term of imprisonment from ten to five years; and, invoking the provisions of Section 276(1)(i) of the Criminal Procedure Act (1997)<sup>1185</sup>, he placed the appellant under correctional supervision.

Another noteworthy judgment is *Brandt v S*<sup>1186</sup> where the SCA replaced a sentence of life imprisonment imposed by the High Court on an offender, who was 17 years at the time of the commission of the offence, with a sentence of 18 years imprisonment. In particular, the SCA held that:

In Sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles: including the principle of *proportionality*; *the best interests of the child*; and, *the least possible restrictive deprivation of the child's liberty*, which should be a *measure of last resort* and *restricted to the shortest possible period of time*. Adherence to recognised international law principles must entail a limitation on certain forms of sentencing such as a ban on life imprisonment without parole for child offenders.<sup>1187</sup> [Emphasis added].

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<sup>1184</sup> Ballard, op. cit.

<sup>1185</sup> Act 51 of 1997, which permits the placement of child offender under correctional supervision ‘in the discretion of the Commissioner or a parole board’.

<sup>1186</sup> [2005] 2 All SA 1 (SCA).

<sup>1187</sup> Ibid, para. 20.

The most recent decision<sup>1188</sup> to consider the principles applicable in sentencing of child offenders prior to the operation of the CJA in South Africa is *Fredericks v S*.<sup>1189</sup> In this case, the appellant appealed to the SCA against the sentence only imposed by the Western Cape High Court (Cape Town) (Dlodlo and Yekiso, JJ).<sup>1190</sup> He and his co-accused were convicted and sentenced by the Parrow Regional Court as follows: on count 1: robbery with aggravating circumstances as contemplated in Section 1 of the Criminal Procedure Act (1997), whereby firearms and knife were used, for which they were sentenced to 15 years' imprisonment each; on count 2: rape, whereby his co-accused only was sentenced to 10 years' imprisonment; and on count 3: rape, to 10 years' imprisonment each. Effectively, the appellant was to serve a total of 25 years' imprisonment and his co-accused, 35 years' imprisonment. On appeal to the Western Cape High Court, their appeal was dismissed and the sentences were confirmed. On further appeal to the SCA, the only issue for determination was

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<sup>1188</sup> The judgement in appeal in this case was delivered by the SCA on 29 September 2011.

<sup>1189</sup> Case No. 208/2011 [SCA] (neutral citation *Fredericks v S* (2008/11) [2011] ZASCA 177 (29 September 2011)). This case is considered at length in Ballard, C., "Youthfulness and Sentencing Prior to the Operation of the Child Justice Act: A Case Review of *Fredericks v The State*", op. cit.

<sup>1190</sup> Briefly, the facts of this case were thus: On 6 of July 1999, in the dead of night, the appellant and his co-accused entered the premises of the complainant, Mr Esterhuizen, with the intention of unlawfully breaking into the house and steal. They found Mr Esterhuizen outside the house, as the barking of the dogs had woken him. They produced a firearm and a knife. They forced Mr Esterhuizen back into the house. All the other occupants of the house, his wife and children, were awakened and bundled into one room and threatened with the firearm and knife. The appellant and his co-accused demanded money. Having failed to solicit money they demanded bank cards. The appellant took Mr Esterhuizen's bank cards and went to the bank to withdraw money, after having forcefully obtained the pin code. His co-accused remained in the house while wielding the firearm. The appellant returned without the money. The two accused started removing the goods, as listed in the charge sheet, whose value was estimated at R6220.00. While ransacking the house, the appellant raped one of the children, E, a 15 year old girl and later his co-accused also raped her. Later the co-accused raped the other child, L, 18 years of age. This whole episode took about six to seven hours. The appellant removed the stolen goods, while his co-accused remained in the house but left the house later. Apparently these goods were to be used to pay back a debt they owed a rival gang. The appellant and his co-accused were later arrested, charged, convicted and sentenced by the Parrow Regional Court. Effectively the appellant was to serve a total of 25 years' imprisonment and his co-accused, 35 years' imprisonment. They appealed to the Western Cape High Court (Dlodlo J and Yekiso J concurring). Their appeal was dismissed and the sentences confirmed. Leave to appeal against sentence to the SCA was granted by the High Court in respect of the appellant only.



whether or not, in the circumstances of this case, the Regional Court and the High Court misdirected themselves in imposing a lengthy custodial sentence on a juvenile who was 14 years and 10 months old at the time of the commission of the offence.

It should be noted that the commission of the offences in this case took place on 6 July 1999, well before the CJA was enacted and became operational. Thus, the SCA applied the principles applicable to sentencing of child offenders as enshrined in the South African Constitution and case law. The SCA found the sentencing of of a 14 year old child to 25 years' imprisonment, given the circumstances of this case, 'startlingly inappropriate.' The SCA noted the difficulty that arises 'when a juvenile has to be sentenced for having committed a very serious crime like in this case'; and held that:

Whilst the gravity of the offences calls loudly for severe sentence with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component. After all, the appellant was an immature youth merely 14 years old. Although youthfulness remains a strong mitigating factor, one cannot ignore the sad reality that, nowadays it is the youth that is engaged in violent and serious crimes.

It acknowledged, nonetheless, that although the general purpose of sentencing is to deter, punish and prevent the re-occurrence of crimes in society, when it comes to child offenders, 'rehabilitation seems to be emphasized more.'<sup>1191</sup> In coming to this conclusion, the SCA considered the decision in *S v Jansen*<sup>1192</sup>, where it was held that:

In the case of a juvenile offender it is above all necessary for the Court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. *The interests of the society cannot be served by disregarding the interests of the juvenile,*

<sup>1191</sup> Ballard, op. cit. See also *S v B* 2006 (1) SACR 311 (SCA), paras. 19-20.

<sup>1192</sup> 1975 (1) SA 425 (A) at 427H-428A.

*for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. [Emphasis mine].*

Having considered the relevant constitutional and international law principles, the SCA held that ‘the attention given to a child when considering sentence is not done in a vacuum. The seriousness of the offence, its impact on the victims and the interests of the broader society must be taken into consideration.’ This reasoning is in line with what Botha, JA, held in *S v Jansen*<sup>1193</sup>; that is: ‘To enable a Court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the Courts to call for a report of the offender by a probation officer in, at least, all serious cases.’<sup>1194</sup>

Elaborating on its observation that sentencing ‘is clearly the most difficult part of criminal proceedings’; the SCA held that:

It becomes more onerous where a child is the offender and the offence is a very serious one. In the present case the robbery involves the use of a firearm and a knife whilst the rape is of a child under the age of 16 years. A decision regarding an appropriate sentence becomes even more difficult – when a juvenile has to be sentenced for having committed a very serious crime like in this case.

Therefore, the court held while the gravity of the offences requires a ‘severe sentence with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component.’ Appreciating the fact that the appellant was an immature youth merely 14 years old at the time he committed the offence, the SCA balanced between his youthfulness, as “a strong mitigating factor”; and the seriousness of the crime he committed, which calls for severe punishment of the offender with a view to preventing re-occurrence. Out of this balance, the court decided to lower the sentence, aiming at rehabilitation

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<sup>1193</sup> *S v Jansen*, op. cit.

<sup>1194</sup> See particularly *S v Adams* 1971 (4) SA 125; and *S v Yibe* 1964 (3) SA 502 (E).

of the appellant. This finding was premised in the provisions of Section 28(1)(g) of the South African Constitution, which provides that:

Every child has the right – not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate of time, ...

In the light of these provisions, the SCA was of the view that: ‘Failure to give effect to the above constitutional imperative renders such omission a material misdirection by a presiding officer.’ The court observed further that:

This conclusion was influenced by *Brandt v S*<sup>1195</sup>, where Ponnann, JA, held that international law principles, which are well re-echoed in the South African Constitution, reiterate that proportionality is a consideration and that ‘child offenders should not be deprived of their liberty except as a measure of last resort and, where incarceration must occur, the sentence must be individualized with the emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society.’ In *S v Williams*<sup>1196</sup> it was suggested that South Africa’s child justice legislation should incorporate accepted international standards, as well as such further rules and limitations as to ensure effective implementation of the international standards. Concepts, such as resocialisation and re-education when dealing with sentencing of children, were suggested to be regarded as complementary to the traditional aims of punishment relating to adults. In fact, when the CJA was enacted, it paid heed to these judicial pronouncements as indicated in the following analysis.

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<sup>1195</sup> [2005] 2 All SA 1 (SCA).

<sup>1196</sup> 1995 (7) BCLR 861 (CC).

### **6.5.7.2 Objectives of Sentencing and Factors to be Considered in Sentencing**

As pointed out above, the CJA has incorporated international law as well as South African constitutional law principles relating to sentencing of child offenders. One of such principles is for a child justice legislation to set out clear objectives of sentencing. The objectives<sup>1197</sup> of sentencing are set out in Section 69(1) of the CJA, which are: first, to encourage the child to understand the implications of and be accountable for the harm caused. Second, to promote an individualized response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society. Third, to promote the reintegration of the child into the family and community. Fourth, to ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration. Fifth, to use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

When considering the imposition of a sentence involving compulsory residence in a CYCC in terms of Section 76<sup>1198</sup>, a child justice court must, in addition to the factors referred to in subsection (4) relating to imprisonment, consider the following factors: first, whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities. Second, whether the harm caused by the offence indicates that a residential sentence is appropriate. Third, the extent to which

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<sup>1197</sup> The rationale for CJA to embody a sentencing chapter with an enumeration of objectives of sentencing is discussed at some considerable in Gallinetti, J., *Getting to Know the Child Justice Act*. Bellville: Child Justice Alliance, 2009; and Sloth-Nielsen, J. and Gallinetti, J., “‘Just Say Sorry?’ *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008”, op. cit, pp. 77-80.

<sup>1198</sup> This sentence is one that provides a programmes referred to in Section 191(2)(j) of the Children’s Act.

the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm. Fourth, whether or not the child is in need of a particular service provided at a CYCC.<sup>1199</sup>

When considering the imposition of a sentence involving imprisonment in terms of Section 77, the child justice court must take the following factors into account: first, the seriousness of the offence, with due regard to the amount of harm done or risked through the offence; and the culpability of the child in causing or risking the harm.<sup>1200</sup> Second, the court must consider protection of the community to be offered to the concerned child<sup>1201</sup>. Third, the court must also consider the severity of the impact of the offence on the victim.<sup>1202</sup> Fourth, the court must consider the previous failure of the child to respond to non-residential alternatives, if applicable.<sup>1203</sup> Fifth, the court must establish the desirability of keeping the child out of prison.<sup>1204</sup>

In this context, the North Gauteng Court, while reviewing three different but similar cases<sup>1205</sup> decided by magistrates courts on this matter, has held that ‘when considering sentencing a child to a reform school a court must be guided by the principles of sentencing.’<sup>1206</sup> The court was of the view that ‘a child has the not to be detained except as a measure of last resort, in which case the child may only be

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<sup>1199</sup> Section 69(3) of the CJA.

<sup>1200</sup> Ibid. Section 69(4)(a).

<sup>1201</sup> Ibid. Section 69(4)(b).

<sup>1202</sup> Ibid. Section 69(4)(c).

<sup>1203</sup> Ibid. Section 69(4)(d).

<sup>1204</sup> Ibid. Section 69(4)(e).

<sup>1205</sup> These cases are reviewed in Courtenay, R.M., “S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)”, op. cit.

<sup>1206</sup> Ibid.

detained for the shortest appropriate period of time.<sup>1207</sup> In particular, the North Gauteng High Court held in these cases that:

[R]eferral to a reform school, which amounts to an involuntary, compulsory admission to a facility where the convicted child is obliged to participate in various programs, represents a serious invasion of the child's rights to freedom of movement and decision making. Such a sentence should therefore not be imposed lightly or without compelling reasons.

In two of the three cases, the court, after considering the fact that the children were first time offenders, they were young and that the crimes were not serious, found the sentences<sup>1208</sup> wholly inappropriate and set them aside.

The CJA obliges a child justice court imposing a sentence to request a pre-sentence report prepared by a probation officer prior to the imposition of sentence.<sup>1209</sup> This prerequisite is founded in the premise that in the South African juvenile justice system, 'probation officers play a pivotal role in the sentencing of a child offender.'<sup>1210</sup> As Courtenay points out, probation officers are the 'ones at the coalface, who have an intimate knowledge of the social factors relevant to the matter

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<sup>1207</sup> Ibid.

<sup>1208</sup> In one of the two cases, a child anonymised as CKM appeared before the Mankweng Magistrate's Court for the first time on 9 September 2009, where he was charged together with two others with assault, for allegedly having hit one FT on 5 September 2009. There were no allegations in the trial court that the complainant had suffered any injuries. CKM was fourteen years old at the time he committed the alleged offence. He pleaded guilty and was convicted as charged. The magistrate sentenced CKM to detention in a reform school, on the strength of the recommendation contained in the probation officer's pre-sentence report. The recommendation was based on CKM's failure to successfully complete a diversion programme; the fact was that he was without supervision by a parent and had developed into a difficult child. CKM had no previous convictions. In the other case, a child anonymised as FTM appeared before the same magistrate as CKM on a charge of housebreaking with the intent to commit an unknown crime. Similar to CKM the magistrate, on the strength of the probation officer's report, sentenced him to a reform school. The recommendations were based on FTM's failure to successfully complete a diversion programme and that he was a "troubled and troublesome child". These facts are adopted from Courtenay, R.M., "S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)", op. cit.

<sup>1209</sup> Section 71(1)(a) of the CJA.

<sup>1210</sup> Courtenay, R.M., "S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)", op. cit.

at hand.’<sup>1211</sup> It is in recognition of this pivotal role of probation officers that courts in the South African juvenile justice system ‘place considerable weight on their pre-sentence reports in order to make determinations of just and equitable sentences.’<sup>1212</sup>

Under the CJA, the probation officer must complete the report ‘as soon as possible but no later than six weeks following the date on which the report was requested.’<sup>1213</sup> However, the child justice court may dispense with a pre-sentence report where a child is convicted of an offence referred to in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case, to the prejudice of the child, ‘but no child justice court sentencing a child may impose a sentence involving compulsory residence in a child and youth care centre providing a programme referred to in Section 191(2)(j) of the Children’s Act or imprisonment, unless a pre-sentence report has first been obtained.’<sup>1214</sup>

Where a probation officer recommends that a child be sentenced to compulsory residence in a CYCC referred to in Section 191(2)(j) of the Children’s Act, the recommendation ‘must be supported by current and reliable information, obtained by the probation officer from the person in charge of that centre, regarding the availability or otherwise of accommodation for the child in question.’<sup>1215</sup> In compiling their reports, probation officers must consider all alternatives to detention,

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<sup>1211</sup> Ibid.

<sup>1212</sup> Ibid.

<sup>1213</sup> Section 71(2) of the CJA.

<sup>1214</sup> Ibid. Section 71(1)(b).

<sup>1215</sup> Section 71(3) of the CJA.

which must be placed before the sentencing court.<sup>1216</sup> In so doing, custodial sentence (whether in correctional centres or in an CYCC) ‘should only be recommended as a last resort and, where appropriate, for the shortest period of time.’<sup>1217</sup> Furthermore, a recommendation for custodial sentence should be ‘reserved for child offenders who commit the most serious of crimes and even then only when facts justify such recommendations.’<sup>1218</sup> Nonetheless, a child justice court ‘may impose a sentence other than that recommended in the pre-sentence report and must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.’<sup>1219</sup>

### **6.5.7.3 Sentencing Options**

Paragraph (4) of Article 40 of the CRC requires that alternative options to sentencing and institutional placement of children found guilty of committing offences must be available to ensure that sentencing is consistent with the aims of juvenile justice. In compliance with this requirement, the CJA provides an array of sentencing options, including community-based sentences, which is ‘a sentence which allows a child to remain in the community and includes any of the options referred to in Section 53, as sentencing options, or any combination thereof and a sentence involving correctional supervision referred to in Section 75.’<sup>1220</sup>

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<sup>1216</sup> Courtenay, R.M., “S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)”, op. cit.

<sup>1217</sup> Ibid.

<sup>1218</sup> Ibid.

<sup>1219</sup> Section 71(4) of the CJA.

<sup>1220</sup> Ibid, Section 72(1).



Another sentencing option is restorative justice sentence whereby a child justice court that convicts a child of an offence may refer the matter: to a family group conference in terms of Section 61<sup>1221</sup>; or for victim-offender mediation in terms of Section 62<sup>1222</sup>; or to any other restorative justice process which is in accordance with the definition of restorative justice.<sup>1223</sup> Payment of fine or alternatives to fine is also used as one of the sentencing options under the CJA. Under Section 74(1) a child justice court convicting a child of an offence for which a fine is appropriate must, before imposing a fine, first, inquire into the ability of the child or his or her parents, an appropriate adult or a guardian to pay the fine, whether in full or in instalments; and, second consider whether the failure to pay the fine may cause the child to be imprisoned.

The child justice courts may also impose sentences involving correctional supervision under Section 75 of the CJA. In this regard, the child justice court that convicts a child of an offence may impose a sentence involving correctional supervision in the case of a child who is 14 years or older, in terms of Section 276(1)(h) or (i) of the CPA; or in the case of a child who is under the age of 14 years, in terms of Section 276(1)(h) of the CPA. The child justice court may also impose a sentence of compulsory residence in CYCC (providing a programme referred to in Section 191(2)(j) of the Children's Act) in terms of Section 76(1).

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<sup>1221</sup> Ibid, Section 73(1)(a).

<sup>1222</sup> Ibid, Section 73(1)(b).

<sup>1223</sup> Ibid, Section 73(1)(c).

The sentence of imprisonment may not be imposed by the child justice court on a child who is under the age of 14 years at the time of being sentenced for the offence.<sup>1224</sup> However, the child justice court may sentence a child who is 14 years or older at the time of being sentenced for the offence, but this ‘must only do so as a measure of last resort and for the shortest appropriate period of time.’<sup>1225</sup> The child justice court may also postpone or suspend passing a sentence in terms of Sections 77(2) and 78(1) of the CJA and Section 297 of the CPA. In such situation, the court may consider the following as conditions<sup>1226</sup>:

- (a) Fulfilment of or compliance with any option referred to in section 53(3)(a) to (m), (q) and (7) of this Act; and
- (b) a requirement that the child or any other person designated by the child justice court must again appear before that child justice court on a date or dates to be determined by the child justice court for a periodic progress report.<sup>1227</sup>

Under subsection (3) of Section 78 of the CJA a child justice court that has postponed the passing of sentence in terms of subsection (1) of this section on one or more conditions ‘must request the probation officer concerned to monitor the child’s compliance with the conditions imposed and to provide the court with progress reports indicating compliance.’

### **6.5.8 Appeals and Automatic Review of Certain Convictions and Sentences**

This part analyzes the right to appeal for children convicted as having infringed penal law under the CJA. It also examines circumstances where such convictions and sentences are subject to automatic review.

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<sup>1224</sup> Ibid, Section 77(1)(a).

<sup>1225</sup> Ibid, Section 77(1)(b).

<sup>1226</sup> In addition to the provisions of Section 297 of the CPA.

<sup>1227</sup> Ibid, Section 78(2).

### 6.5.8.1 Appeals

The right of appeal to children convicted by the child justice court is well provided for in terms of Section 84 of the CJA; and is procedurally dealt with in terms of the provisions of Chapters 30 and 31 of the CPA. However, where a child was, at the time of the commission of the alleged offence, under the age of 16 years; or 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended,

... he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court and in terms of section 316 of that Act in the case of an appeal from a High Court: Provided further that the provisions of section 302(1)(b) of that Act apply in respect of a child who duly notes an appeal against a conviction, sentence or order as provided for in section 302(1)(a) of that Act.

In principle, the child referred to in subsection (1) ‘must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.’<sup>1228</sup>

### 6.5.8.2 Automatic Review in Certain Cases

The child who is convicted by the child justice court also has the right to have his or her case reviewed in certain circumstances.<sup>1229</sup> This takes place in the purview of Section 85(1) of the CJA and in terms of the provisions of Chapter 30 of the CPA dealing with the review of criminal proceedings in the lower courts. However, if a child was, at the time of the commission of the alleged offence, under the age of 16 years; or 16 years or older but under the age of 18 years, and has been sentenced to

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<sup>1228</sup> Ibid, Section 84(2).

<sup>1229</sup> Recently, the North Gauteng High Court reviewed three different cases involving child offenders decided by the Mankweng Magistrate’s Court in the purview of this provision. *See* particularly Courtenay, R.M., “S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)”, *op. cit.*

any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in Section 191(2)(j) of the Children's Act, 'the sentence is subject to review in terms of Section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.'<sup>1230</sup>

In a progressive approach, the CPA guarantees the right to be admitted to bail for every child whenever his or her release on bail is considered, pending the review of a sentence as provided for in Section 307 of the CPA; or the appeal against a sentence as provided for in Sections 309(4) and 316 of the CPA. In such circumstances, the provisions of Section 25 of the CJA, dealing with the release of children on bail, apply.<sup>1231</sup>

## **6.6 Parliamentary Oversight of the Implementation of the CJA**

Section 96(3) of the CJA provides a room for parliamentary oversight of the implementation of the CJA.<sup>1232</sup> It categorically requires the Cabinet member responsible for the administration of justice to consult with the Cabinet members responsible for safety and security, correctional services, social development, education and health and submit reports to Parliament on the implementation of the CJA within one year after its commencement. These reports are in respect of each the

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<sup>1230</sup> Section 85(2) of the CJA.

<sup>1231</sup> Ibid, Section 86.

<sup>1232</sup> An overview of issues that were discussed in Parliament during the review of the parliamentary oversight of the first year of operation of the CJA in 2011 is discussed in Waterhouse, S., "Parliament Reviews the Implementation of the Child Justice Act." *Article 40*. Vol. 13 No. 2, September 2011. The proceedings of this review are available at <http://www.pmg.org.za/report/20110622-joint-meeting-implementation-child-justice-act>. See also Gallinetti, J., *Getting to Know the Child Justice Act*, op. cit.

Department or institution referred to in Section 94(2)<sup>1233</sup>, on the implementation of the CJA.<sup>1234</sup> The said departments are required to submit those reports to Parliament every year thereafter.<sup>1235</sup>

Functionally, the requirement to submit implementation reports to Parliament allows the legislature to exercise its oversight function through monitoring the implementation of the CJA. It also ensures that the implementation 'is consistent with the original intention of the legislature.'<sup>1236</sup> This requirement is actually in line with South African new approach to ensuring that the hitherto existing gap and disparity between policy and legislation and their implementation are closed. This trend can also be seen in respect of such legislation as Criminal Law (Sexual Offences and Related Matters) Amendment Act (2007).<sup>1237</sup> In principle, this approach 'has forced the question of how to strengthen the implementation of important laws that protect and promote basic human rights.'<sup>1238</sup> So, the approach 'can be seen as an attempt by the legislature to take steps to close the gap through systematizing oversight.'<sup>1239</sup>

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<sup>1233</sup> These departments constitute the Intersectoral Committee for Child Justice established under Section 94(1) of the CJA. They consist of the Director-General: Justice and Constitutional Development, who is the chairperson of the Committee; the National Director of Public Prosecutions; the National Commissioner of the South African Police Service; the National Commissioner of Correctional Services; the Director-General (Social Development); the Director-General (Education); and the Director-General (Health).

<sup>1234</sup> Section 96(3)(a) of the CJA.

<sup>1235</sup> *Ibid*, Section 96(3)(b).

<sup>1236</sup> Waterhouse, S., "Parliament Reviews the Implementation of the Child Justice Act", *op. cit.*

<sup>1237</sup> See particularly Section 65(3) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, No. 32 of 2007. This section contains reporting requirement similar to Section 96(3) of the CJA.

<sup>1238</sup> Waterhouse, *op. cit.*

<sup>1239</sup> *Ibid*.

As noted during the deliberations on the first year of implementation of the CJA at Parliament that took place on 22<sup>nd</sup> June 2011<sup>1240</sup>, regular reporting Parliament allows for the identification of strengths, weaknesses and gaps in the implementation process; thus, enabling Parliament to identify gaps and weaknesses in the CJA. It is only upon identifying the strengths, weaknesses and gaps in the implementation process that Parliament can effect efficient amendments to the CJA.

## **6.7 Conclusion**

This Chapter has examined South Africa's international law obligation to domesticate international juvenile justice standards. In compliance with this obligation, South Africa enacted the CJA in 2008, which came into force on 1 April 2010 in terms of Section 100. The enactment of the CJA has brought about progressive elements in the administration of juvenile justice in South Africa. Such progressive elements include the CJA's recognition of international juvenile justice standards and the supremacy of the Constitution; the guiding principles underlying the CJA; and the MACR. It has also brought about progressive features relating to methods of securing attendance of a child at preliminary inquiry or in courts; release and detention or placement of children; and assessment of offending children.

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<sup>1240</sup> The meeting was convened by Parliamentary Portfolio Committees on Justice and Constitutional Development and Correctional Services, where they were briefed by the Department of Justice and Constitutional Development on behalf of the Inter-Sectoral Committee on Child Justice (ISCCJ), established in terms of Section 94 of the CJA. *See* particularly, Inter-Sectoral Committee on Child Justice, "Presentation to Portfolio Committee on Justice and Constitutional Development: Consolidated Progress Report on Implementation of the Child Justice, 2008 (Act No. 75 of 2008): Inter-Sectoral Child Justice Steering Committee (ISCCJ)." Presented by Advocate P. Kambula, Chief Director (Promotion of Rights of Vulnerable Groups, Department of Justice and Constitutional Development on behalf of the Director-General of the National Department of Justice and Constitutional Development and the Chair of the National ISCCJ, 22<sup>nd</sup> June 2011. In attendance at this meeting, there were also representatives of various State Departments and civil society organisations.

In a very detailed manner, the CJA has also legislated provisions and programmes relating to diversion where now diversion is statutorily entrenched and recognised. The Chapter has examined the sentencing options in the CJA as well as the parliamentary oversight of the implementation of the CJA. It can, therefore, be concluded that the CJA complies, to a great extent, with the international juvenile justice standards. In short, the CJA has managed to domesticate all international juvenile justice standards relating to the administration of juvenile justice; by clearly regulating the MACR as well as the treatment of children below the MACR. It has also creatively blended theories inherent in the African justice systems, such as *Ubuntu*, with principles enshrined in the international juvenile justice law. As discussed in this Chapter, the CJA provides a significant legislative statement of the theory of *Ubuntu*, which seeks to balance between the interests of the offending child and his or her family, on the one hand, and the interests of the victim and the community affected by offending, on the other; thereby discouraging revenge and retaliation to the offending child.

The CJA has also adequately domesticated the due process rights inherent in international juvenile justice law. These include the right to legal representation, whereby free legal assistance is to be provided by the state; the right to be heard; the right to admission to bail without undue restrictions; the rights to a fair trial; and the right not to be subjected to inhumane or degrading treatment. The CJA has also domesticated the international law principle which requires that incarceration of a child should only be applied as a matter of last resort and only for a short period. In this context, the CJA encourages diversion of the child offender right from the time

the child is arrested up until he or she is finally and conclusively processed through the criminal justice system. To be able to check the effectiveness of its implementation, the CJA contains provisions relating to parliamentary oversight of the implementation; by compelling a cabinet member responsible for the administration of justice to submit to parliament implementation reports within one year after the CJA became operational. As seen in the discussion in this Chapter, the requirement to submit implementation reports allows parliament to exercise its oversight function through monitoring of the implementation of the CJA.



## CHAPTER SEVEN

### 7.0 DOMESTICATION OF INTERNATIONAL JUVENILE JUSTICE STANDARDS IN TANZANIA: AN EXAMINATION OF THE LAW AND PRACTICE

#### 7.1 Introduction

The need to provide legal protection to children in conflict with the law in international law cannot be over emphasised. Similarly, in Tanzania this need has been expressed for a long time now.<sup>1241</sup> This call has been founded in many international human rights instruments, particularly basing on the principle set out in the Universal Declaration of Human Rights (UDHR) of 1948 to the effect that childhood is entitled to special care and assistance.<sup>1242</sup> The UDHR, in particular, has recognized similar provisions in the Geneva Declaration of Human Rights (1924) and the UN Declaration of the Rights of the Child (1959),<sup>1243</sup> which states that: ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’

Thus, when the United Nations General Assembly (UNGA) adopted the Convention on the Rights of the Child (CRC)<sup>1244</sup> in 1989 there was already in existence other international instruments protecting the rights of children, particularly those in

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<sup>1241</sup> See particularly Law Reform Commission of Tanzania, “Report on Laws Relating to Children in Tanzania”. Submitted to the Minister of Justice and Constitutional Affairs, April 1994; Legal and Human Rights Centre, *The State of Juvenile Justice*. Dar es Salaam: Legal and Human Rights Centre, 2003; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*. Dar es Salaam: Tume ya Haki za Binadamu na Utawala Bora, 2004, p. 15.

<sup>1242</sup> See particularly Article 25 of the Universal Declaration of Human Rights.

<sup>1243</sup> The Declaration was adopted by the UNGA on 20<sup>th</sup> November 1959.

<sup>1244</sup> The CRC was adopted and opened for signature, ratification and accession by the UNGA resolution 44/25 of 20<sup>th</sup> November 1989; and entered into force on 2<sup>nd</sup> September 1990, in accordance with Article 49.

conflict with the law. Interestingly, the preamble to the CRC refers to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”) in recognition that ‘in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.’ According to principle 2 of the UN Declaration on the Rights of the Child: ‘The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.’

The United Nations Committee on the Rights of the Child (the “CROC”) has regularly emphasised that ‘all countries that have ratified the CRC need to ensure that their legislation is fully compatible with the provisions and principles of the CRC.’<sup>1245</sup> In respect of Tanzania, the CROC has, more than once, urged Tanzania to enact legislation that would effectively protect children’s rights, including the rights of children in conflict with the law.<sup>1246</sup> Emphasising on the need for Tanzania to

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<sup>1245</sup> African Child Policy Forum, *In the Best Interest of the Child: Harmonizing Laws in Eastern and Southern Africa*. Addis Ababa: African Child Forum/UNICEF, 2007, p.3.

<sup>1246</sup> See particularly CROC, “Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania,” 09/07/2001, CRC/C/15/Add.156; CROC, “Concluding Observations: United Republic of Tanzania.” UNCRC/C/TZA/CO/2, 21 June 2006; CROC, “Consideration of Reports Submitted by States Parties under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Sale, Child Prostitution and Child Pornography: Concluding Observations (United Republic of Tanzania).” Consideration of the Initial Report of the United Republic of Tanzania, CRC/C/OPSC/TZA/CO/1, 3 October 2008; CROC, Consideration of Reports Submitted by States Parties under Article 12(1) of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict: Concluding Observations (United Republic of Tanzania).” Consideration of the Initial Report of the United Republic of Tanzania, CRC/C/OPAC/TZA/CO/1, 3 October 2008. See also African Committee of Experts on the Rights and Welfare of the Child (ACERWC), “Concluding Recommendations on the Republic of

implement this recommendation, in 2010, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) recommended that:

The Committee urges the State Party to work on the Concluding Observations made by the UN Committee on the Rights of the Child aimed at improving the state of juvenile justice in its jurisdiction, by particularly enacting comprehensive provisions in the juvenile justice standards; allocating sufficient human and physical resources; and conduct regular training to juvenile justice personnel to ensure that juvenile justice is administered in consonance with best practices and international standards.<sup>1247</sup>

However, this was not done until 31<sup>st</sup> July 2009 when the Government of Tanzania introduced in Parliament a Bill to enact the Law of the Child Act (LCA)<sup>1248</sup>. This Bill was passed by Parliament into law on 4<sup>th</sup> November 2009 and assented to by President Jakaya Kikwete on 20<sup>th</sup> November 2009. Provisions relating to legal protection of children in conflict with the law have been, particularly, contained in Part IX of the LCA.

Therefore, this Chapter examines the provisions relating to the protection of children in conflict with the law in the context of the existing international children's rights instruments. The Chapter looks at the prevalence of, and risk factors for, juvenile delinquency in Tanzania. It also examines the impact of juvenile delinquency in society and how to prevent it. In a detailed account, the Chapter critically examines provisions relating to the treatment of children in conflict with the law as set out in Part IX of the LCA; by particularly scrutinising its salient features – i.e., criminal capacity and minimum age of criminal responsibility; and the exposure of children in conflict with the law to the criminal justice system.

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Tanzania Report on the Status and Implementation of the African Charter on the Rights and Welfare of the Child", 2010.

<sup>1247</sup> ACERWC, "Concluding Recommendations on the Republic of Tanzania Report on the Status and Implementation of the African Charter on the Rights and Welfare of the Child", 2010, p. 9.

<sup>1248</sup> The *Bill Supplement* in respect of this Bill was published in the *Gazette of the United Republic of Tanzania*, Vol. 90 No. 20, on 10<sup>th</sup> July 2009.

Other salient features relating to juvenile justice examined in this Chapter are the establishment of the Juvenile Court, its jurisdiction and applicable procedures. Methods of securing the attendance of a child in conflict with the law at the preliminary inquiry are also among the features examined in this Chapter. In addition, the Chapter examines the procedure obtained in the release and/or detention of a child in conflict with the law pending his or her processing in the criminal justice system; and the manner of dealing with a child committing an offence in association with adults.

Furthermore, the Chapter critically examines provisions relating to evidence adduced in court by a child as a witness; sentencing of a child; and placement of a child upon sentencing. In the end, the Chapter analyses the gaps inherent in the LCA in relation to the administration of juvenile justice.

## **7.2 Prevalence of Juvenile Delinquency in Tanzania**

Although there is no nationwide consolidated and disaggregated statistical data, juvenile delinquency is widespread in Tanzania.<sup>1249</sup> Non-availability of statistical information on child offending in Tanzania is common as a result of lack proper record and data management systems in the juvenile justice institutions: the police, judiciary, prisons and social welfare department. In a recent study<sup>1250</sup> commissioned by the Ministry of Constitutional and Legal Affairs (MoCLA) in collaboration with

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<sup>1249</sup> See Legal and Human Rights Centre, *The State of Juvenile Justice*, op. cit; Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*, op. cit, p. 15; and Commission for Human Rights and Good Governance, "Report on Situational Analysis of Children Deprived of their Liberty in Detention Facilities in Tanzania." Dar es Salaam: Commission for Human Rights and Good Governance, 2011.

<sup>1250</sup> The research was conducted by the National Organisation for Legal Assistance (**nola**) based in Tanzania and the UK-based Coram Children Legal Centre (Essex University).

UNICEF, for instance, researchers sought to collect central level collated data and data from the entries in police log books in all of the sample regions on the number of children who were arrested in a 12 month period, disaggregated by age, gender and type of offence. Unfortunately, ‘researchers were only able to collect quantitative data from the log-books of police stations in three out of the ten study’s regions<sup>1251</sup>: Lindi Urban, Dodoma Central and Tanga Urban Police Stations.’<sup>1252</sup> In addition, researchers were unable to collect data on the extent and nature of offending by children at the national level<sup>1253</sup>; although official statistics indicate that offending children mostly commit theft, followed by housebreaking.<sup>1254</sup> However, the table below indicates criminal cases involving children dealt with by the police.

**Table 1: Number of persons under 18 who have been arrested by the police due to an alleged conflict with the law (2008 - 2010) in Tanzania Mainland**

Reported Cases	Sent to court	Convicted	Acquitted	Under investigation	Closed Undetected	No offence disclosed	No further action	Total arrested
3258	669	428	411	664	774	66	246	3258

**Source: Ministry of Home Affairs, Tanzania Police Force, December 2011.**

Available statistical information indicates that juvenile delinquency is rampant in Tanzania, whereby 50% of the children arrested in a 12-month period in the three police stations under the MoCLA study were arrested for suspected theft or for

<sup>1251</sup> These Regions were Arusha, Dar es Salaam, Dodoma, Kigoma, Kilimanjaro, Lindi, Mbeya, Mtwara, Mwanza and Tanga.

<sup>1252</sup> See United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania.” Dar es Salaam: Ministry of Constitutional and Legal Affairs (MoCLA)/UNICEF, July 2011.

<sup>1253</sup> Ibid.

<sup>1254</sup> Reported in United Republic of Tanzania, “Consideration of the Second Periodic CRC Report: 1998-2003,” answers to questions raised for additional and updated information considered in connection with the 2<sup>nd</sup> CRC report to the UN Committee on the Rights of the Child on 15<sup>th</sup> -19<sup>th</sup> May 2006.

another suspected minor property offence. Sexual offences were the second most common type of offence for which children were arrested, constituting 21%. As the MoCLA study notes: ‘significant proportion of arrests for sexual offences was for statutory rape; that is, sexual conduct that is, in fact, consensual, but where one or both of the parties was below the age of consent at the time of the act.’<sup>1255</sup>

According to the MoCLA study:

It appears that there are no guidelines setting out the circumstances in which the offence of statutory rape should be prosecuted and the circumstances in which there will be a presumption against prosecution, as this will not be in the public interest. These findings were supported by the juvenile justice professionals who were interviewed in all regions. Virtually all reported that theft (e.g. pick pocketing, stealing, particularly of mobile phones) was by far the most common offence for which children were arrested in their district. These professionals also noted that sexual offences (in particular, rape) represented a significant proportion of all offences for which children are arrested. Most professionals also mentioned more serious property offences such as breaking, entering and stealing and armed robbery as being among the offences for which children are typically arrested in their district. Several professionals reported that, where children are arrested for more serious property offences, they are normally being ‘used’ by adults to commit these offences.<sup>1256</sup>

The data provided in the MoCLA report also indicates that a significant proportion of children are arrested for public disorder offences, such as vagrancy, loitering, touting or for “disrupting passengers”.<sup>1257</sup> Juvenile justice professionals across most districts also mentioned that it is not uncommon for children to be arrested for disorder offences, such as “roaming around town”, “using abusive language”, and so on. The report finds this to be a cause for concern in that: ‘Offences such as vagrancy, loitering and truancy are often the result of poverty, lack of parental care and other socio-economic problems. They disproportionately affect vulnerable children, such

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<sup>1255</sup> Ibid.

<sup>1256</sup> Ibid.

<sup>1257</sup> Ibid.

as children living or working on the street.’<sup>1258</sup> In fact, the CROC has stated that these offences should not be criminalised but rather, dealt with through a State’s child protection system, using measures that give ‘effective support to parents and/or caregivers and measures which address the root causes of this behaviour.’<sup>1259</sup> According to Article 56 of the Riyadh Guidelines: ‘In order to prevent further stigmatization, victimization and criminalization of young persons, legislation should be enacted to ensure that any conduct not considered an offence or not penalized if committed by an adult is not considered an offence and not penalized if committed by a young person.’

At the same time, the juvenile justice system in Tanzania suffers scarcity of detention facilities for offending children. This can be exemplified by the fact that the remand facilities for children are unevenly distributed – located in Arusha, Dar es Salaam, Kilimanjaro, Mbeya and Tanga regions only<sup>1260</sup> – with the central, western and north-western zones having no separate placements for children.<sup>1261</sup> The first report released on the monitoring of the implementation of MKUKUTA<sup>1262</sup> in December

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<sup>1258</sup> Ibid.

<sup>1259</sup> UN Committee on the Rights of the Child, General Comment No. 10: “Children’s Rights in Juvenile Justice”. CRC/C/GC/10, 25 April 2007, para. 9.

<sup>1260</sup> By the end of 2012 there were established 7 Retention Homes under Section 133(9) of the Law of the Child Act. As per the First Schedule to the Law of the Child (Retention Homes) Rules (2012) GN. No. 151, the existing Retention Homes are located in Arusha, Dar es Salaam, Mbeya, Moshi, Mtwara, Mwanza and Tanga Regions. However, the Mtwara and Mwanza Retention Homes are yet to be operational.

<sup>1261</sup> See particularly United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania*. Dar es Salaam: Research and Analysis Working Group/MKUKUTA Monitoring System, Ministry of Planning, Economy and Empowering, 2006, p. 32; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*, op. cit.

<sup>1262</sup> This is an abbreviation of Kiswahili words: *Mkakati wa Kukuza Uchumi na Kuondoa Umaskini Tanzania*, whose English version is: National Strategy for Growth and Reduction of Poverty (NSGRP).

2006 by Research and Analysis Working Group (RAWG)<sup>1263</sup>, also notes that the administration of juvenile justice in the country is ‘lagging due to the lack of appropriate facilities; the central, western and north-western zones do not have separate placement for juvenile offenders.’<sup>1264</sup>

At the same time, there is only one Approved School (at Irambo in Mbeya region) and one Juvenile Court (at Kisutu in Dar es Salaam region) as illustrated by the table below.

**Table 2: Number of institutions specifically for persons under 18 as, accused of, or recognized as having infringed the penal law**

Facility	Number
Retention Homes <sup>1265</sup>	5
Juvenile Court	1
Approved school	1
<b>Total</b>	<b>7</b>

This means that offending children in these zones are processed in the criminal justice system and remanded or imprisoned in facilities with adult offenders,<sup>1266</sup>

<sup>1263</sup> RAWGU was under the MKUKUTA Monitoring System, in then the Ministry of Planning, Economy and Empowering (MPEE). Currently, it is under the Ministry of Finance.

<sup>1264</sup> See United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania*. Dar es Salaam: Research and Analysis Working Group, MKUKUTA Monitoring System, 2006, p. 27.

<sup>1265</sup> According to the First Schedule to the Law of the Child (Retention Homes) Rules, GN. No. 151/2012, there are two additional Retention Homes established under Section 133(9) and Rule 5(2) of these Rules. These Retention Homes are to be located in Mtwara and Mwanza Regions; and were not functional at the time of completion of this study.

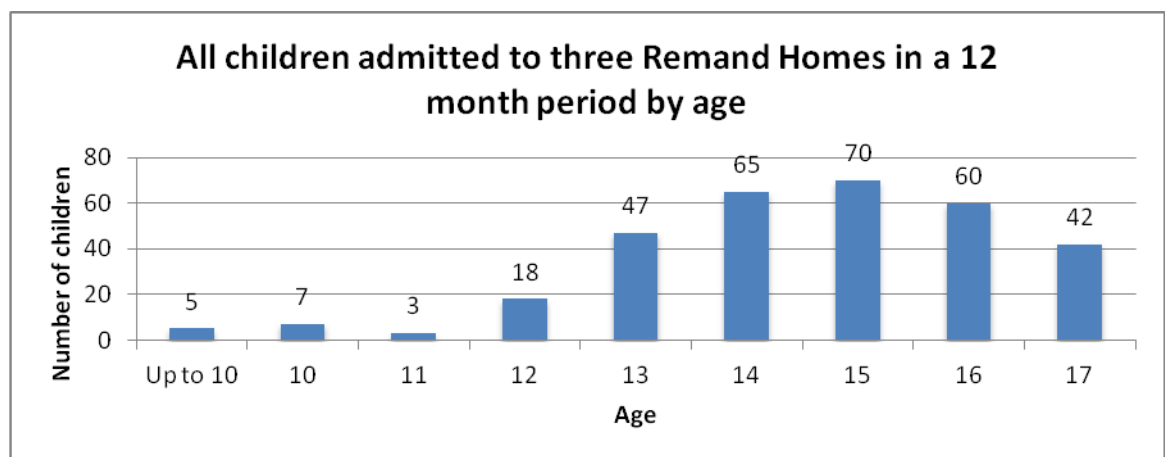
<sup>1266</sup> Legal and Human Rights Centre, *The State of Juvenile Justice*, op. cit; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*, op. cit, p. 15. This seems to be a common problem even in other East African countries: Kenya and Uganda. In Uganda, for instance, although the country’s Constitution provides [in Articles 34(6) and 93(6)] that child offenders kept in lawful custody or



which has a negative impact on the offending children's well-being and welfare.<sup>1267</sup>

This is justified by the number of children (844) who were kept in pre-trial detention in Tanzania Mainland in 2003-2005, which greatly surpasses the required capacity of the available child detention facilities in the country (428).<sup>1268</sup> Recent statistical information also confirms this contention as illustrated in the figure below:

**Figure 1: Number of Children Admitted to Three Retention Homes in Months (2011)**



**Source:** Ministry of Constitutional and Legal Affairs/UNICEF, “Analysis of the Situation for Children in Conflict with the Law.” July 2011.

However, this number is not realistic because, as the recent report of the MKUKUTA Monitoring System notes, the pattern of data relating to juvenile delinquency in

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detention shall be kept separately from adult offenders and not to be remanded in adult prisons, in practice children in conflict with the law are detained in adult jails due to lack of sufficient child detention facilities. See particularly African Child Policy Forum, *In the Best Interest of the Child: Harmonizing Laws in Eastern and Southern Africa*, op. cit, p. 87.

<sup>1267</sup> For a detailed discussion on this issue see particularly, Legal and Human Rights Centre, *The State of Juvenile Justice*, ibid; Mashamba, C.J., “Fundamental Principles of Administration of Juvenile Justice and State Compliance with its Obligations under International Human Rights Instruments: The Case of Tanzania.” Op. cit; and Mashamba, C.J., “Emerging Issues in Diverting Juvenile Offenders from Criminal Justice System: The Socio-Cultural Realities, Economics and Politics of Administration of Juvenile Justice in Tanzania”, op. cit.

<sup>1268</sup> See statistics available at the former Ministry of Home Affairs 2006 (Prisons) reported in United Republic Of Tanzania, “Consideration of the Second CRC Periodic Report: 1998-2003 – Answers to Questions Raised for Additional and Updated Information to be Considered in Connection to Second CRC Report during the UN CRC Committee Session on 15<sup>th</sup>-19<sup>th</sup> May, 2006, in Geneva, Switzerland,” Ministry of Community Development, Gender and Children; April 2006

recent years is erratic.<sup>1269</sup> The report notes that the Ministry of Home Affairs, which is responsible for maintaining data on detained or arrested juveniles, has no comprehensive data on the number of offending children. Instead, the report observes, the ‘number of juveniles detained in remand homes [are] reported by the Ministry of Health and Social Welfare.’<sup>1270</sup> The report notes further that,

The number of juveniles in [remand] homes consistently decreased from 913 in 2004 to 728 in 2006, increased to 1,101 in 2007 and decreased again to 880 in 2008. In the absence of further information on the total number of juveniles in detention it is difficult to say whether the trend for juvenile detention is improving. However, the Commission for Human Rights and Good Governance (CHRAGG) has expressed particular concern about the numbers of juveniles who are being detained in facilities with adults.<sup>1271</sup>

The practice of placing offending children in adult remand or prison facilities breaches the principle enacted in Article 17(2)(b) of the ACRWC and Article 37(c) and (d) of the CRC, all of which require that children who are to be placed in detention must be placed in separate facilities from those housing adult offenders. This principle aims at saving offending children from being contaminated with criminal manners by adult offenders when they intermingle in remand or prison facilities.

So, from the available official data, it can be argued that the present criminal justice system in Tanzania does not provide adequate safeguards to children in conflict with the law. Therefore, it is in itself violative of the basic rights of children in conflict with the law, contrary to the established international juvenile justice standards.

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<sup>1269</sup> United Republic of Tanzania, *Poverty and Human Development Report 2009*. Dar es Salaam: Research and Analysis Working Group (Ministry of Finance and Economic Affairs)/Research on Poverty Alleviation (REPOA), 2009, p. 127.

<sup>1270</sup> Ibid.

<sup>1271</sup> Ibid. See also Commission for Human Rights and Good Governance, *Annual Report for 2006/07*. Dar es Salaam: Commission for Human Rights and Good Governance (CHRAGG), 2008.

The MoCLA study has enlisted several risk factors for children coming into conflict with the law in Tanzania. Basing its findings on interviews with children in conflict with the law and with juvenile justice professionals, the study indicates that, ‘across all regions, poverty, lack of parental care (including children who are orphans or who cannot live at home due to economic conditions or exposure to abuse), poor parenting or parental neglect are factors which expose children to a greater risk of coming into conflict with the law.’<sup>1272</sup> According to the report, these factors will often ‘lead children into situations which make them more “visible” to police or more vulnerable to being exploited by adults, such as those children who are living on the street or children who are working.’<sup>1273</sup> The report also mentions poor educational attainment to be a risk factor for children coming into conflict with the law.<sup>1274</sup>

Respondents, in another survey conducted by the National Organisation for Legal Assistance (**nola**) for Plan Tanzania in 2007<sup>1275</sup>, were of the views that juvenile delinquency has adverse effects on the respective offending children leading them to (i) adopting criminal behaviours; (ii) adopting truant behaviours; (iii) undermining the best interests of the child in the child growing stages; (iv) curtailing positive development of the child; (v) child abuse; (vi) subjecting the child to abject poverty and hence miserable future; and (vii) child school dropping-out.

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<sup>1272</sup> See United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

<sup>1273</sup> Ibid.

<sup>1274</sup> Ibid.

<sup>1275</sup> Plan Tanzania, “Report on the Situation of Children’s Rights in Dar es Salaam, Kibaha, Kisarawe, Ifakara, Mwanza and Geita” (2007). A report of a survey conducted for Plan Tanzania by nola. This research was conducted by nola on behalf of Plan International.

### 7.3 Lack of Measures for Preventing Child Offending

Although the CRC and the ACRWC do not contain specific provisions addressing the prevention of offending by children, the CROC has emphasized the need for a juvenile justice system to address the social roots of offending, and it has also consistently proposed, that the “Riyadh Guidelines” on Prevention of Juvenile Delinquency ‘should be regarded as providing relevant standards for implementation. The Guidelines requires “comprehensive prevention plans” to be instituted at every level of government and proposes that they should be implemented within the framework of the Convention and other international instruments.’<sup>1276</sup>

However, in Tanzania there are no any discernible measures devised, and currently being taken, by the state to prevent child offending in the country. Asked what measures should be adopted to prevent offending by children in their respective communities, respondents in the Plan and MoCLA surveys were of the views, *inter alia*, that: (i) the Government should establish a well-functioning juvenile justice system; (ii) the Government should construct remand homes and approved schools at least in every region; and improve the condition of the existing ones; (iii) the Government and CSOs should ensure that offending children are availed prerequisite legal aid; (iv) the Government should ensure that it expedites the introduction of diversion measures of juvenile delinquents<sup>1277</sup>; and (v) the Government should ensure that juvenile justice personnel are specifically trained to enable them to effectively administer the juvenile justice system.

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<sup>1276</sup> Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, op. cit, p. 546.

<sup>1277</sup> This aspect is discussed in part 7.6 of this chapter.

#### **7.4 Lack of a Separate, Comprehensive Legal Framework for Children in Conflict with the Law in Tanzania**

The Law of the Child Act (LCA) does not provide a separate, comprehensive set of legal provisions and procedures that apply specifically to children in conflict with the law.<sup>1278</sup> The LCA, which ‘represents a significant development in establishing a separate criminal justice system for children’<sup>1279</sup> by containing a number of provisions that specifically apply to children in conflict with the law, does not cover all aspects of the criminal justice process relating to children in conflict with the law as compared to the South African CJA.<sup>1280</sup> The LCA ‘is limited to establishing and regulating proceedings before the Juvenile Court, the application of custodial and alternative sentences, and regulating Approved Schools.’<sup>1281</sup> This omission contravenes the requirement of international children’s rights norms, which demand that states should develop separate juvenile justice systems with separate rules of procedure applying for children only.

According to the CROC, the CRC and the UN rules and guidelines together ‘call for the adoption of a child-oriented [justice] system that recognizes the child as a subject

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<sup>1278</sup> See particularly United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit; and Mashamba, C.J., “A Child in Conflict with the Law under the Tanzanian *Law of the Child Act* (2009): Accused or Victim of Circumstances?” Vo. 8 No. 2 *The Justice Review*, 2009.

<sup>1279</sup> United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, ibid.

<sup>1280</sup> Examined in Chapter Six of this study.

<sup>1281</sup> See Legal and Human Rights Centre, *The State of Juvenile Justice*, op. cit; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*, op. cit, p. 15. Of late, however, the the Minister of Health and Social Welfare has made the Law of the Child (Retention Homes) Rules (2012), GN. No. 151/2012, which were published on 4<sup>th</sup> May 2012. Amongst other things, the Rules regulate the establishment, functioning and monitoring of the functioning of the retention homes. They also set out a comprehensive child rights that are to be protected by the retention homes in respect of children in these institutions [see particularly Rule 4(1)].

of fundamental rights and freedoms and stresses the need for all actions concerning children to be guided by the best interests of the child as a primary consideration.’<sup>1282</sup>

This call derives its basis from the provisions of Article 40 of the CRC and Article 17 of the ACRWC, which oblige States Parties thereto to put in place policy, legislative and practical/programmatic measures that accord ‘special protection for all children alleged as, accused of, or recognised as having infringed the penal law.’<sup>1283</sup> Therefore, Tanzania, being a State Party to these international children rights instruments,<sup>1284</sup> has an obligation to abide by this requirement. Although this obligation is enshrined in the long title to the LCA<sup>1285</sup>, it is not well articulated in the same law; thus, a need arises to amend it or have a separate child justice law in the context of the South African CJA.<sup>1286</sup>

## **7.5 Salient Features of the LCA in Respect of Children in Conflict with the Law**

This part critically examines the salient features in the LCA relating to children in conflict with the law. These features include the criminal capacity; the establishment of the Juvenile Court and the administration of juvenile justice in Tanzania;

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<sup>1282</sup> Report on the ninth session, May-June 1995, CRC/C/43, Annex VIII, p. 64.

<sup>1283</sup> African Child Policy Forum, *In the Best Interest of the Child: Harmonizing Laws in Eastern and Southern Africa*, op. cit, p. 79. See also Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, op. cit, p. 590.

<sup>1284</sup> Tanzania ratified the CRC in 1991 and the ACRWC in 2003.

<sup>1285</sup> The long title of the LCA stipulates that this is: ‘An Act to provide for reform and consolidation of laws relating to children, to stipulate rights of the child and to promote, protect and maintain the welfare of a child with a view to giving effect to international and regional conventions on the rights of the child; to provide for affiliation, foster care, adoption and custody of the child; to further regulate employment and apprenticeship; to make provisions with respect to a child in conflict with law and to provide for related matters.’

<sup>1286</sup> A recent call for the amendment of the LCA to encompass detailed provisions relating to child justice was made at the 15<sup>th</sup> Family Law Conference in Cape Town. See Mashamba, C.J., ‘The Implications of the 2009 Law of the Child Act on Family Law in Tanzania.’ A paper presented at the Family Law Conference held at Radisson Hotel, Granger Bay, Cape Town, South Africa, on 15-16 March 2012.

jurisdiction of the Juvenile Court; procedure and proceedings in the Juvenile Court; methods of securing attendance of child at preliminary inquiry; release (on bail or otherwise) and/or detention of a child prior to sentence; and manner of dealing with a child committing an offence in association with adults. Other salient features examined in this part include placement of a child in a retention or remand home; procedure on hearing in the Juvenile Court; procedure where a child is a witness; sentencing and alternative to custodial sentence; and appeal against the decisions of the juvenile court.

The guiding principles for the administration of juvenile justice under the LCA are enshrined in section 99(1). According to this section, the procedure for conducting proceedings by the Juvenile Court in all matters is in accordance with rules to be made by the Chief Justice for that purpose.<sup>1287</sup> While the rules are yet to be promulgated by the CJ, in any case involving a child, the following principles are to be observed in the context of this section:-

- (a) the Juvenile Court should sit as often as necessary;
- (b) proceedings in the Juvenile Court should be held in camera<sup>1288</sup>;
- (c) proceedings should be informal as possible, and made by enquiry without exposing the child to adversarial procedures;
- (d) a social welfare officer should be present;

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<sup>1287</sup> At the time of compiling this research, the Chief Justice had prepared the rules, which were submitted to the Attorney General for publication in the official *Gazette*.

<sup>1288</sup> Under Subsection (2) of Section 99 of the LCA, apart from members and officers of the Juvenile Court, only the following persons may, at the discretion of the Court, attend any sitting of Juvenile Court: first, parties to the case before court, their advocates, witnesses and other persons directly concerned or involved in the case; and, second, any other person whom the court may authorize to be present.

- (e) a parent, guardian or a next of kin has the right to be present in the proceedings involving a child in the Juvenile Court;
- (f) the child has the right to be represented by a next of kin or an advocate;
- (g) the right to appeal should be clearly explained to the child; and
- (h) the child has the right to give an account and express an opinion.

It is, nonetheless, expected that the rules<sup>1289</sup> to be made by the CJ will make a clear provision for the guiding principles and procedures in the administration of juvenile justice in Tanzania.

Unlike the South African Child Justice Act, which is a child-justice specific law, the Tanzanian Law of the Child Act does not have specific objectives for the administration of juvenile justice. Rather, in its long title, the LCA seeks to make provisions with respect to a child in conflict with law. Impliedly, the provisions contained in Part IX of the LCA seek to establish a separate system for dealing with child offenders away from the criminal justice system.

### **7.5.1 Criminal Capacity of Children**

The import of criminal capacity of children both at the international and municipal levels is discussed at length in Chapter Six, whereby it is observed that the CRC has required States Parties to set a minimum age for criminal responsibility (MACR) that, according to the Beijing Rules, should not be too low. In recognition of (and in

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<sup>1289</sup> At the time of writing of this study, there were consultations underway to make rules of procedure for the effective functioning of Part IX of the LCA, particularly in the Juvenile Court.



compliance with) this requirement, the LCA has clearly set out the MACR as discussed herein below.

#### **7.5.1.1 Definition of a Child**

In the previous legal setting there was a chronic problem of defining who a child was. Different laws provided differently as to who was the child, which resulted in more practical controversies.<sup>1290</sup> In order to do away with this glitch, the LAC has provided a single definition of a child. In section 3(1) the LAC defines a child as a person below the age of eighteen years. This is a very progressive definition, which complies with the definitions of a child in the CRC and ACRWC; and it is hoped that there will be no further controversies as to who is a child in Tanzania.

#### **7.5.1.2 Minimum Age of Criminal Responsibility (MACR)**

As stated in Chapter Six (Section 6.5.1) of this study, States Parties to both the CRC and ACRWC are obliged to set a minimum age of criminal responsibility (MACR)<sup>1291</sup>; that is, an age below which a child cannot be presumed to have the

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<sup>1290</sup> For a detailed account on this problem, see particularly United Republic of Tanzania, "Report of Tanzania Law Reform Commission on the Law Relating to Children in Tanzania." Report submitted to the Minister of Justice and Constitutional Affairs, April 1994; Legal and Human Rights Centre, *The State of Juvenile Justice*, op. cit; UN CRC Committee, "Consideration of Reports Submitted by States Parties under Article 40 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania," CRC/C/TZA/CO/2, dated 2<sup>nd</sup> June, 2006; and Mashamba, Clement J., "Basic Principles to be Incorporated in the New Children Statute in Tanzania." In Mashamba, C.J. (ed.), *Using the Law to Protect Children's Rights in Tanzania: An Unfinished Business*, op. cit.

<sup>1291</sup> Article 40(3) of the CRC requires that States 'shall seek to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. Similarly, the ACRWC provides that 'there shall be a minimum age below which children shall be presumed not to have the capacity to infringe the penal law.'

capacity to infringe criminal law.<sup>1292</sup> In General Comment No. 10, the CROC urges that States Parties should be encouraged to increase their minimum age of criminal responsibility, regarding 12 years as the absolute MACR. In this regard, the CROC has recommended that States Parties should continue to increase their respective MACR to an even higher age level, for instance, 14 or 16 years.<sup>1293</sup>

However, the minimum age of criminal responsibility in Tanzania is low compared to the foregoing international standard.<sup>1294</sup> As set out in the Penal Code, the “absolute” MACR is ten years. However, a child below the age of 12 years is not considered to be criminally responsible ‘unless it is proved that at the time of committing the act or making the omission he or she had capacity to know that he or she ought not to do the act or make the omission.’<sup>1295</sup> This appears to offer protection to children between the ages of 10 to 12 years, ‘as it provides a presumption that a child aged 10 – 12 years is *doli incapax* (i.e. incapable of committing a crime) and appears to place an obligation on the state to rebut this presumption.’<sup>1296</sup> But it should be noted that the CROC has expressed concern about the practice of *doli incapax* in its concluding observations on States Parties’ reports and in its General Comment No. 10,<sup>1297</sup> emphasizing that it ‘strongly recommends that States parties

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<sup>1292</sup> Rule 4 of the Beijing Rules states that: ‘in those legal systems recognising the concept of the age of criminal responsibility for juveniles, the beginning of that age shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity.’

<sup>1293</sup> General Comment No. 10, paras 32 and 33.

<sup>1294</sup> See particularly United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

<sup>1295</sup> See Section 15(2) of the Penal Code, Cap. 16 R.E. 2002.

<sup>1296</sup> See particularly United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

<sup>1297</sup> General Comment No. 10, para. 34, provides that: ‘The Committee wishes to express its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is

set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.’<sup>1298</sup> In particular, the CROC, in its concluding observations on Tanzania in 2006, urged the government to ‘clearly establish the age of criminal responsibility at 12 years, or at an older age that is an internationally accepted standard.’<sup>1299</sup>

The LCA has expressly amended Section 15 of the Penal Code by particularly adding a subsection, which provides that: ‘any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act 2009.’<sup>1300</sup> However, the meaning of this provision is unclear; because the LCA covers many areas and contains provisions that encompass juvenile justice and child protection. This amendment may only serve, therefore, to apply the juvenile justice provisions of the LCA to children in conflict with the law who are aged between 10 and 12 years. This, in effect, does not absolve children aged between 10 and 12 years of criminal liability.<sup>1301</sup>

### **7.5.1.3 Determination of the MACR**

Unlike the CJA in South Africa, the LCA does not require every juvenile justice agency (police, social welfare/probation services, prosecution, defence and the judiciary) to determine the age of a child who come into contact with them. Instead,

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accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible’.

<sup>1298</sup> Ibid.

<sup>1299</sup> CROC, “Concluding Observations: United Republic of Tanzania.” UNCRC/C/TZA/CO/2, 21 June 2006, para. 70(b).

<sup>1300</sup> See particularly Section 174 of the LCA.

<sup>1301</sup> United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

the duty to determine the age of a child accused of committing an offence is vested in the court. It should be noted, nevertheless, that the LCA has cured the mischief of misinterpreting the age of “a child” when such child is before the Juvenile Court or any court. Before the LCA was enacted the practice was for the court to order for medical examination of a child in conflict with the law, which was to be corroborated by other circumstantial evidence such as statement from parents, relatives or guardians. However, in practice, medical evidence as to determination of age was problematic. For instance, in *Sangu Saba & Another v R*<sup>1302</sup>, where an x-ray was used to examine the accused as to his age, the East African Court of Appeal held that: ‘It is so well known as to be within the judicial knowledge of the court that even with the aid of X-rays, age cannot be assessed exactly.’ In similar tone, in *Yusufu Kabonga v R*<sup>1303</sup>, Biron, J. (as he then was) held that: ‘However high the medical officer's qualifications and the extent of his experience, I am very far from persuaded that a doctor ... could give a definite assessment in respect of age ... with that degree of certainty required in a criminal law.’

In order to address this anomaly, the practice was as described by George, C.J. (as he then was) in *Francis Mtunguja v R*<sup>1304</sup>: that is, the court should call for additional evidence to corroborate the medical evidence as to age. This was allowed even on appeal so as to elucidate a matter left vague in the trial court. In *Emmanuel Kibona v R*<sup>1305</sup>, the High Court held that: ‘Evidence of a parent is even better than that of a medical doctor as regards that parent’s child’s age. And additional evidence is as

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<sup>1302</sup> [1971] HCD no. 385.

<sup>1303</sup> [1968] HCD no. 188.

<sup>1304</sup> [1970] HCD no. 181.

<sup>1305</sup> (1995) TLR 241.

vital in sentencing as in the trial itself.’ So it allowed the appellants to bring additional evidence in the form of baptism certificates and any other certificates.

Thus, the requirement of determining the age of a child who is brought before the Juvenile Court or any court is now clearly set out in Sections 113 and 114 of the LCA. Accordingly, Section 113(1) provides that where a person, whether charged with an offence or *not*<sup>1306</sup>, ‘is brought before any court<sup>1307</sup> otherwise than for the purpose of giving evidence, and it appears to the court that he is a child, the court shall make due inquiry as to the age of that person.’<sup>1308</sup> In determining the age of a person before it, the court has a duty to take into account the “best interests of the child” enacted in Section 4 of the LCA. As the High Court held in the *Lulu* Case, this principle has to ‘be applied presumptively to any person whose age is to be determined.’<sup>1309</sup> In this case, an actress commonly known as Lulu was arraigned at the Kisumu Resident Magistrates’ Court for murder of one Steven Charles Kanumba (a renowned actor in Tanzania). Committal proceedings were commenced at the same court, in the course of which the advocates for Lulu applied to the presiding magistrate for an order seeking to stay the committal proceedings; and, instead

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<sup>1306</sup> In *Elizabeth Michael Kimemeta @ Lulu v Republic*, High Court of Tanzania at Dar es Salaam, Miscellaneous Criminal Application No. 46 of 2012 (unreported) (herein after, “the *Lulu* Case”) the High Court held that: ‘Section 113 (1) may apply even where there are no proceedings pending in a particular Court. However, a person seeking such determination must satisfy the Court that he is not a mere busy body and that the application is made for good purpose. For instance, a social welfare officer who is faced with such a question in the discharge of his functions under the Act, may wish to call upon the aid of a Court of law in order to find out whether a particular person is a child or not. In such a situation, the matter will proceed in accordance with the procedure set out in subsections (2), (3), (4) and (5) of Section 113.’

<sup>1307</sup> In the *Lulu* Case (ibid) the High Court held that by virtue of the definition of the word “Court” in Section 3 of the LCA, the High Court ‘has concurrent jurisdiction with the other Courts mentioned therein to determine the age of a person in trouble with the law.’

<sup>1308</sup> This matter has recently been given judicial interpretation for the first time in the *Lulu* Case, ibid.

<sup>1309</sup> Ibid, p. 11.

thereof, commit the said child to the Juvenile Court. The presiding magistrate declined to grant this prayer, holding, *inter alia*, that the said court had no jurisdiction to entertain such an application and held that ‘If the accused has any application to make, the same [could only] be made to the High Court of Tanzania.’ Consequent to this holding, the advocates for Lulu applied to the High Court for, *inter alia*, an order that the High Court should order the Kisutu Resident Magistrates’ Court to stay the committal proceedings and ascertain the age of the accused with a view to committing her to the Juvenile Court in the context of the LCA.

Although the High Court faulted the procedure used by the advocates for Lulu of making a fresh application instead of an application for revision of the foregoing order, it invoked its supervisory powers under Section 44 of the Magistrates’ Courts Act (1984)<sup>1310</sup>; thereby revising and quashing the said order. In this context, the

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<sup>1310</sup> Cap. 11 R.E. 2002. Section 44(1)(a) of the Magistrate’s Court Act provides that:

‘(1) In addition to any other powers in that behalf conferred upon the High Court, the High Court—

(a) shall exercise general powers of supervision over all district courts and courts of a resident magistrate and may, at any time, call for and inspect or direct the inspection of the records of such courts and give such directions as it considers may be necessary in the interests of justice, and all such courts shall comply with such directions without undue delay...’

However, this approach was quashed by the Court of Appeal of Tanzania when this matter landed in that court in *DPP v Elizabeth Michael Kimemeta @ Lulu v Republic* Court of Appeal of Tanzania at Dar es Salaam, Criminal Application No. 6 of 2012 (unreported). In this case, Luanda, JA, held that the High Court has no revisional powers under Section 44(1) of the Magistrate’s Courts Act (MCA); rather, it has supervisory powers. Referring to its previous decision in *John Mgaya & 4 Others v Edmund Mjengwa & 6 Others* Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 8 of 1997 (unreported), the Court of Appeal held that the scope of the High Court in Section 44(1) of the MCA is to supervise District and Resident Magistrates’ Courts through giving directions; and not to revise their decisions. According to the Court of Appeal, ‘to “supervise” is not one and the same thing as to “revise”.’ The Court of Appeal, therefore, counselled that the High Court ought to have given directions to the Resident Magistrate’s Court (Kisutu) to determine the age of the accused person, instead of doing so by itself through the purported revision. It consequently quashed the proceedings in the High Court and remitted the records to the Kisutu Resident Magistrate’s Court for continuation of committal proceedings without any direction as to the determination of age. It should be noted that, by so doing, the Court of Appeal of Tanzania failed to use this opportunity to rectify the legal problem associated with the determination of age of an accused person who appears to be under 18 years of age.

High Court held that: ‘The decision of the RM’s Court to refuse to entertain the applicant’s application was an error of law and an abdication of the Court’s duty.’ Staying the committal proceedings at Kisumu Resident Magistrates’ Court pending its determination of the applicant’s age, the High Court held that:

Considering the seriousness of the charge facing the applicant and the urgency of determining whether or not the applicant is entitled to the benefits of the Law of the Child Act, and in the interests of justice, this Court, invoking its supervisory powers under section 44 of the Magistrates’ Court Act, shall proceed to determine the correct age of the applicant now before it, in terms of section 113 of the Law of the Child Act.<sup>1311</sup>

As it was stated by the High Court in the *Lulu* Case, Section 113 of the LCA ‘does not say under what circumstances it is to be applied.’<sup>1312</sup> According to the High Court this does not, nonetheless, ‘deviate from the requirement that there must be a legally acceptable purpose for which that person is brought to Court (other than for giving of evidence).’<sup>1313</sup> Thus, the High Court opined that:

There must be a reason as to why a person is brought before a Court of law in order for the Court to exercise its powers and determine the age of that person. Otherwise, one could invoke the provision and present a person in any Court, at any time, so long as the Court is one of those envisaged by the Act, and request that an enquiry be made on the age of that person. The legislature could not have intended it to be so wide.<sup>1314</sup>

The procedure to be followed in determining the age of a person brought before a court is set out in subsection (2) of Section 113, which obliges the court to ‘take such evidence at the hearing of the case which may include medical evidence and, or DNA test as necessary to provide proof of birth, whether it is of a documentary nature or otherwise as it appears to the court to be worthy of belief.’ To justify the validity of medical evidence or a DNA test as to the age of a child, the court is obliged under subsection (3) of Section 113 to receive a certificate signed by a

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<sup>1311</sup> See the *Lulu* Case, op. cit, p. 13.

<sup>1312</sup> Ibid, p. 8.

<sup>1313</sup> Ibid.

<sup>1314</sup> Ibid.

medical practitioner licensed under the provisions of the law governing medical practice in Tanzania. However, the court may order otherwise where circumstances warrant departure from this requirement.

It should be noted that an order or judgment of the court ‘shall not be invalidated by any subsequent proof that the age of that person has not been correctly stated to the court and the age found by the court to be the age of the person so brought before it shall, for the purposes of this section, be deemed to be the true age of that person.’<sup>1315</sup> It should also be noted that medical evidence and or collection of blood for the purpose of DNA from the child ‘shall be conducted in the presence of a social welfare officer.’<sup>1316</sup>

The foregoing rule has an exception embedded in the provisions of Section 114(1), which provide that where it appears to the court that ‘any person brought before it is of the age of beyond eighteen years, that person shall, for the purposes of this section, be deemed not to be a child.’ However, where the court has failed to establish the correct age of the person brought before it, ‘then the age stated by that person, parent, guardian, relative or social welfare officer shall be deemed to be the correct age of that person.’<sup>1317</sup>

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<sup>1315</sup> Section 113(4) of the LCA.

<sup>1316</sup> Ibid. Section 113(5).

<sup>1317</sup> Ibid. Section 114(2). In their Alternative Child Act Bill, CSOs had suggested that: ‘Section 71(1) An order or judgment of the court shall not be invalidated by any subsequent proof that the age of the person has not been correctly stated to the court and the age presumed or declared by the court to be the age of that person shall be deemed to be his true age for the purposes of the proceedings.

(2) A certificate signed by a medical officer as to the age of a person under eighteen years of age shall be evidence of that age.’



The problem with the foregoing provisions is that they apply to age determination by the court only. This is contrary to the spirit of international juvenile justice law, which requires that age determination of a child who comes into contact should apply to all juvenile justice agencies: police, social welfare and court. The South African CJA is in compliance with this international juvenile justice law requirement and has comprehensive provisions relating to age determination; where there are certain circumstances in which age can be determined or estimated: estimation by a probation officer, an inquiry magistrate, a child justice court or any other court before which a child is charged.<sup>1318</sup>

In respect of the minimum age of criminal responsibility, the LCA has expressly amended Section 15 of the Penal Code by adding a subsection providing that: ‘any person under the age of twelve years who commits an act or omission which is unlawful shall be dealt with under the Law of the Child Act 2009.’ However, the meaning of this provision has been criticized as unclear. In fact, the LCA covers many areas and contains provisions that ‘encompass juvenile justice and child protection. It is unclear whether this changes the minimum age of criminal responsibility in the Penal Code, which is 12 years, or 10 years if criminal capacity can be established.’<sup>1319</sup>

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<sup>1318</sup> This aspect is discussed at length in Chapter Six of this study.

<sup>1319</sup> United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

#### 7.5.1.4 Treatment of Children under the MACR

In Chapter Six it has been noted that international children's rights law requires states parties to set up legal protection mechanisms for the treatment of children who commit criminal activities which may be offences had they been within the MACR. However, the LCA does not contain such legal protection. Accordingly, children below the age of criminal responsibility in some regions in Tanzania are being processed through the criminal justice system. Data from admissions into three Retention Homes over a 12 month period obtained in the MoCLA study shows that 'five children below the age of 10 were admitted into the Homes.'<sup>1320</sup> Similarly, in its recent survey in all prisons of Tanzania, CHRAGG also found a number of children under the age of 10 years in detention. In this study researchers reported that 27 out of 179 children interviewed during visits to detention centres stated that they were under 10 years old.<sup>1321</sup>

Many of these children were detained for disorder or other minor offences. This included a child in Tanga Retention Home who was nine at the time of admission and had been arrested for theft; two children in Dar es Salam aged four and nine for 'disturbing passengers', and a child aged eight in Mbeya for vagrancy. According to professionals, children below the MACR are sometimes brought by parents or carers to the police station or primary courts. A Primary Court Magistrate in Moshi, for instance, reported that:

The youngest child I dealt with was eight. Sometimes parents bring their children to court to ask whether they can be sent to the Approved School. In these cases, I need to establish which offence has been committed.

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<sup>1320</sup> Ibid.

<sup>1321</sup> Commission for Human Rights and Good Governance. "Report on Situational Analysis of Children Deprived of their Liberty in Detention Facilities in Tanzania", op. cit, p. 33.

At the Moshi Retention Home a Social Welfare Officer in Charge informed researchers in the MoCLA study that:

... the youngest child detained in the Retention Home is a boy of nine years. He is being charged for use of abusive language against his mother, together with his brother. He is treated in the same manner as any other juvenile, despite him being below the minimum age of criminal responsibility.

The MoCLA study also found 10 children under the age of 12 placed in the retention homes (most were arrested for theft). In practice, there is no procedure for establishing capacity for children aged between 10 and 12 years. This omission has the effect of exposing children to the formal criminal justice system where they, in fact, have no criminal responsibility.

As noted in the MoCLA study, the reason for processing children who are below the MACR through the criminal justice system is partly attributed to a lack of knowledge of juvenile justice laws on the part of juvenile justice personnel, including lack of knowledge of what the MACR is.<sup>1322</sup> It is also caused by the sheer absence of clear legal provisions relating to procedure or mechanisms of referral for children below the MACR, as opposed to the clear mechanisms in the South African CJA on the treatment of children below the MACR. It is, therefore, not surprising to note that Police Officers and Magistrates interviewed in this study appear to be ‘at a loss for what to do with children below the MACR who engage in criminal behaviour. In Mbeya, for instance, a Police Sergeant, who stated that the minimum age of criminal responsibility is seven, reported that the same procedure is followed for a child under the MACR who engages in criminal behaviour (arrest; interview; draft a charge;

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<sup>1322</sup> See particularly United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

bring him before a court of law).<sup>1323</sup> For instance, one 12 year old child ‘was found in police detention, having been arrested the night before. He had been taken to court that morning, and the Magistrate did not lay charges as he was too young. The child was taken back to the police station and detained.’<sup>1324</sup>

In addition, there is an “acceptable” practice amongst several professionals that children below the MACR who engage in more serious criminal behaviours are detained for their own protection. That is, ‘due to anger in the community over, in particular, more serious crimes. In these cases, Police Officers in some regions feel it is necessary to arrest a child below the MACR and process them through the criminal justice system.’<sup>1325</sup> For instance, a Police Officer in Charge in Arusha responded in the MoCLA study that: ‘normally [we arrest children] from 10 years. However, due to the gravity of the offence and sentiments from the community, we sometimes arrest such children under 10 for very serious offences.’<sup>1326</sup>

### **7.5.2 Exposure of Children in Conflict with the Law to the Criminal Justice System**

Although international juvenile justice law requires that specialised units for children in conflict with the law be established within the police, the prosecution, the judiciary, the court administration and social services,<sup>1327</sup> in Tanzania there is yet to

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<sup>1323</sup> Ibid.

<sup>1324</sup> Ibid.

<sup>1325</sup> Ibid.

<sup>1326</sup> Ibid.

<sup>1327</sup> General Comment No. 10, paras 92, 93 and 94.

evolve a specialised juvenile justice system.<sup>1328</sup> This contention is concretized by the fact that, although the LCA *de jure* establishes separate juvenile courts to deal with all cases involving children in Tanzania<sup>1329</sup>, there is only one juvenile court at Kisutu in Dar es Salaam that has been established. Similarly, there are only five specialised Retention Homes<sup>1330</sup> and one Approved School<sup>1331</sup>, which ‘only have very limited geographical coverage.’<sup>1332</sup>; although the Ministry of Health and Social Welfare has plans to establish two additional Retention Homes, one in Mwanza and another in Singida. Specialised units, procedures and practices within most criminal justice institutions – police, social welfare, legal aid providers and courts – have not been developed; with limited number of juvenile prosecutors specializing in juvenile justice.

### **7.5.3 The Establishment of the Juvenile Court and the Administration of Justice in Tanzania**

This part examines the Juvenile Court by looking at the legal provisions establishing it, its jurisdiction and procedures in the conduct of proceedings before it.

#### **7.5.3.1 Establishment of the Juvenile Court**

The establishment, jurisdiction of, and proceedings in, the juvenile court are set out in Sections 97 through to 114 of the LCA. The establishment of juvenile courts is set out in Section 97(1) for the purposes of hearing and determining cases relating to

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<sup>1328</sup> United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

<sup>1329</sup> See particularly Section 97 and Section 98 of the LCA.

<sup>1330</sup> The Retention Homes are located in Arusha, Dar es Salaam, Kilimanjaro, Mbeya and Tanga Regions.

<sup>1331</sup> The Approved School s is located at Irambo, about 40km from the Mbeya City.

<sup>1332</sup> United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

child matters. Under subsection (2) of Section 97, ‘the Chief Justice may, by notice in the *Gazette*, designate any premises used by a primary court to be a Juvenile Court.’ According to subsection (3) of Section 97 of the LCA, a ‘Resident Magistrate shall be assigned to preside over the Juvenile Court.’

This provision is in tandem with the international juvenile justice law. According to General Comment No. 10 (2007) on “Children’s Rights in Juvenile Justice”, the CROC emphasises that:

The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty, which are listed in a non-exhaustive manner in article 40(4) of CRC, to assure that deprivation of liberty be used as a measure of last resort and for the shortest possible period of time (art. 37(b) of CRC).<sup>1333</sup>

Under the same General Comment, the CROC ‘requires States to develop and implement a comprehensive juvenile justice policy.’<sup>1334</sup> According to the Committee,

This comprehensive approach should not be limited to the implementation of the specific provisions contained in articles 37 and 40, but should also take into account the general principles enshrined in articles 2, 3, 6, and 12 and all other relevant articles of the CRC, such as articles 4 and 39.<sup>1335</sup>

The establishment of a comprehensive juvenile justice system, by particularly having a separate juvenile court system, is derived from the provisions of Article 40(3) of the CRC, which provides that:

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed the penal law, and, in particular:

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<sup>1333</sup> CROC, General Comment No. 10 (2007) on “Children’s Rights in Juvenile Justice”. CRC/C/GC/10.

<sup>1334</sup> Hodgkin, R. and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, Geneva/New York: UNICEF, 2007, p. 603.

<sup>1335</sup> CROC, General Comment No. 10, op. cit, para 3.

(a) the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) wherever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. [Emphasis added].

This has been given more emphasis by the United Nations Secretary-General's *Study on Violence Against Children*, which reported to the General Assembly in October 2006, recommending that: 'States should establish comprehensive, child-oriented, restorative juvenile justice systems that reflect international standards.'<sup>1336</sup>

Therefore, the establishment of the juvenile court is a positive element of the LCA; and aims at domesticating the foregoing international standards in Tanzania. In support of this progressive element, CSOs had for a long time proposed for the establishment of the Family and Children Courts from the ward on to the High Court levels.<sup>1337</sup> However, there is a general fear amongst CSOs that there might be constructed very few juvenile courts; thus, proposing that the Chief Justice may assist in, or encourage, the construction of the courts through local government authorities.<sup>1338</sup> It should be noted, however, that the construction of the court buildings should be carried out parallel to the increase in the number of requisite expertise on the part of juvenile justice personnel to properly manage these institutions for children.

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<sup>1336</sup> See United Nations, "Report of the Independent Expert for the United Nations Study on Violence against Children." United Nations General Assembly, sixty-first session, August 2006, A/61/, para. 112(b).

<sup>1337</sup> See Section 14 of the CSOs Alternative Child Bill submitted to the Minister for Justice and Constitutional Affairs in 2003.

<sup>1338</sup> See CSOs "Position Paper on the Bill to enact the Law of the Child Act (2009)" presented to the Parliamentary Standing Committee (Community Development) on 7<sup>th</sup> and 8<sup>th</sup> October 2009 at the Karimjee Hall in Dar es Salaam.

### 7.5.3.2 Jurisdiction of the Juvenile Court

The jurisdiction of the Juvenile Court is set out in Section 98 of the Act. Under this section, the Juvenile Court has jurisdiction to hear and determine two sets of matters: first, criminal charges against a child; and, second, *applications*<sup>1339</sup> relating to child care, maintenance and protection.<sup>1340</sup> In addition, the Juvenile Court ‘shall also have jurisdiction and exercise powers conferred upon it by other written law.’<sup>1341</sup>

Under subsection (3) of Section 98, the Juvenile Court ‘shall, wherever possible, sit in a different building from the building ordinarily used for hearing cases by or against adults.’ The legal position before the enactment of the LCA was more or less similar to this one. Under Section 3(1) of the Children and Young Persons Act it was provided that the court ‘when hearing charges against children or young persons shall, if practicable, unless the child or young person is charged jointly with any other person not being a child or young person, sit in a different building or room from that in which the ordinary sittings of the court are held.’ Then the High Court interpreted this section strictly. For instance, in *Mukamambogo v R*<sup>1342</sup> the appellant was charged with and convicted of acts intended to cause grievous harm contrary to Section 222(2) of the Penal Code and was sentenced to 12 months imprisonment by the District Court. However, there was nothing in the record indicating that the

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<sup>1339</sup> CSOs were of the view that the word “applications” limits the scope of litigation as under Order XLIII Rule 2 of the Civil Procedure Code, Cap. 33 R.E. 2002 ‘Every application to the Court made ... shall, unless otherwise provided, be made by a chamber summons supported by affidavit.’ As such, they recommended that the word “applications” should be replaced by the word “matters” which is more wide and would allow any other form of court documents (like petitions) to be filed in court in respect of child care, maintenance and protection. See CSOs “Position Paper on the Bill to Enact the Law of the Child Act (2009)”, *ibid*.

<sup>1340</sup> Section 98(1) of the Act.

<sup>1341</sup> *Ibid*, Section 98(2).

<sup>1342</sup> (1971) HCD no. 63.



proceedings were held in a place different from an ordinary court room, nor was there any indication that it was not practicable for the court to sit in a place different from an ordinary court room. On appeal the High Court quashed the conviction and set aside the sentence because the District Court was not properly constituted.<sup>1343</sup> Consequently, the case was remitted back for retrial before a properly constituted Juvenile Court.

Currently, however, there is a likelihood of having some practical hurdles when it comes to implementing Section 98(3) of the LCA, as there are few court buildings to serve this purpose. Besides, there is always a limited budget allocated to the Judiciary for this matter as well as there is lack of political will to build sufficient court buildings as opposed to current emphasis on constructing buildings for secondary schools at every ward.<sup>1344</sup>

Interestingly, Section 103(1) of the LCA provides that a ‘police officer shall not bring a child to the court unless investigation has been completed or the offence requires committal proceedings.’ In addition, subsection (2) of Section 103 provides that: ‘Where a child is brought before the Juvenile Court for any offence other than homicide, the case shall be disposed by that court on that day.’

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<sup>1343</sup> In the main, the high Court was of the view that: ‘The appellant was a young person and was not on a joint charge with any adult. In order to comply with the above provision therefore the trial magistrate in hearing the case should, if practicable, have sat in a place different from an ordinary court room. It would appear also that this requirement was mandatory by reason of the word “shall” used in the subsection quoted above [i.e. Section 3(1) of the Children and Young Persons Act].’

<sup>1344</sup> See Government of the United Republic of Tanzania, “Initial Tanzania Report on the African Charter on the Rights and Welfare of the Child (1990).” Submitted to the Committee of Experts on the Rights and Welfare of the Child (Addis Ababa, Ethiopia) by the Ministry of Community Development, Gender and Children in December 2006.

In this context, therefore, the court has power to dispose the case wherever the circumstances of that case warrant such action, unless in cases of homicide. This provision, if applied objectively by the courts, would prove to be progressive in reducing unnecessary delays of cases involving children.

### 7.5.3.3 Procedure and Proceedings in the Juvenile Court

The procedure and proceedings in the Juvenile Court are set out in Sections 99 and 100 of the LCA. Specifically, Section 99 provides for the procedure in the Juvenile Court. Indeed, the procedure set out in subsection (1) of this section is not exhaustive, but there is a room for the Chief Justice to make rules for that purpose. Otherwise, the subsection sets out conditions or fundamental principles<sup>1345</sup> to be observed when the Juvenile Court determines matters before it. These principles are similar to those provided for in Article 40(2)(b) of the CRC, which provides that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;<sup>1346</sup>

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;<sup>1347</sup>

(iii) To have the matter determined without delay<sup>1348</sup> by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the

<sup>1345</sup> These principles are examined in part 7.2 above.

<sup>1346</sup> See also Article 11 of the UDHR; Article 17(2)(c)(i) of the ACRWC; and Article 14(2) of the ICCPR.

<sup>1347</sup> Article 9(2) of the ICCPR requires that anyone who is arrested shall be informed, at the time of arrest, of the reasons for it 'and shall be promptly informed of any charges against him.' According to Article 14(3)(a) of the ICCPR, every one charged with a criminal offence shall be 'informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.'

<sup>1348</sup> General Comment No. 10 (2007) on "Children's Rights in Juvenile Justice," the United Nations Committee on the Rights of the Child points out that: 'Internationally there is a consensus that for children in conflict with the law the time between the commission of the offence and the final response to this act should be as short as possible. The longer this period, the more likely it is that the response loses its desired positive, pedagogical impact, and the more the child will be stigmatized.'

presence of legal or other appropriate assistance<sup>1349</sup> and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt;<sup>1350</sup> to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;<sup>1351</sup>

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;<sup>1352</sup>

(vii) To have his or her privacy fully respected at all stages of the proceedings.

Under General Comment No. 10 (2007) the CROC states that ‘no information shall be published that may lead to the identification of a child offender because of its effect of stigmatization and possible impact on their ability to obtain an education, work, housing, or to be safe’. It further states that ‘the right to privacy also means that records of child offenders shall be kept strictly confidential and closed to third parties except for those directly involved in the investigation, adjudication and disposal of the case.’ With a view to avoiding stigmatization and/or prejudgments, the CROC emphasises that ‘records of child offenders shall not be used in adult

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CROC, General Comment No. 10, 2007 (“Children’s Rights in Juvenile Justice”) CRC/GC/10, para. 23.

<sup>1349</sup> According to Rule 15(1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘the Beijing Rules’), ‘Throughout the Proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.’ Rule 15(2) of the Beijing Rules provides that: ‘The parents or the guardians shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.’

<sup>1350</sup> Article 11 of the UDHR and Article 14 of the ICCPR require that in the determination of a criminal charge, everyone shall be entitled ‘not to be compelled to testify against himself or to confess guilt.’

<sup>1351</sup> See also 17(2)(c)(iii) of the African Charter on the Rights and Welfare of the Child.

<sup>1352</sup> See also Article 17(2)(c)(ii) of the ACRWC; Article 14(3)(f) of the ICCPR; and United Nations Committee on the Rights of the Child, General Comment No. 9 (2007) on “The Rights of the Children with Disabilities.”

proceedings in subsequent cases involving the same offender, or to enhance some future sentencing.’

Under subsection (2) of Section 99 of the LCA, there is a prerequisite in relation to persons who are required to appear in a Juvenile Court at its *discretion*.<sup>1353</sup> These persons include: parties to the case before court, their advocates, witnesses and other persons directly concerned or involved in the case; and any other person whom the court may authorize to be present.

In respect of proceedings in the Juvenile Court Section 100(1) of the LCA categorically provides that the Juvenile Court, when hearing a charge against a child ‘shall, if practicable, unless the child is charged jointly with any other person not being a child, sit in a different building or room that which the ordinary proceedings of the court are held.’<sup>1354</sup> Where, in the course of any proceedings in a court it appears to the court that the person charged or to whom the proceedings relate is a child, the court ‘shall stay the proceedings and commit the child to the Juvenile Court.’ in addition, where, in the course of any proceedings in a Juvenile Court ‘it appears that the person charged or to whom the proceedings relate is an adult, the court shall proceed with the hearing and determination of the case according to the

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<sup>1353</sup> CSOs were skeptical about the requirement for court discretion in allowing appearance of other parties than the child, because the discretion might be abused in practice to the detriment of the child.

<sup>1354</sup> Section 100(2) of the LCA.

provisions of Magistrates Court Act<sup>1355</sup> or Criminal Procedure Act,<sup>1356</sup> as the case may be.’<sup>1357</sup>

#### **7.5.3.4 Methods of Securing Attendance of Child at Preliminary Inquiry**

Appearance in the Juvenile Court is governed by Sections 108 and 112 of the LCA. According to Section 108(1), where the child does not admit the offence with which he is charged, or where the court does not accept the statement of the child as amounting to a plea of guilty to that charge, the court ‘shall proceed to hear the evidence of the witnesses for the prosecution.’ Under subsection (2) of Section 108 of the LCA,

(2) In all proceedings against a child, where parents, guardian, relatives or social welfare officer attend, any one of them may, with the prior consent of the court, assist the accused child in the conduct of his case and, in particular, in the examination and cross-examination of witnesses.<sup>1358</sup>

Surprisingly, the provisions of Sections 108(2) and 112 have failed to appreciate the fact that a child is entitled to free legal aid granted by the State, as opposed to its counter-part, the South African CJA.<sup>1359</sup>

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<sup>1355</sup> Cap. 11 R.E. 2002.

<sup>1356</sup> Cap. 20 R.E. 2002.

<sup>1357</sup> Section 100(3) of the LCA.

<sup>1358</sup> The provisions of section 108(2) are similar to the provisions of Section 112 of the LCA, which provide that: ‘Where a child is charged with any offence, the Juvenile Court may in its discretion require the attendance of his parents, guardian, relative or a social welfare officer and may make such orders as are necessary for procuring the attendance.’

<sup>1359</sup> The need for provision of free legal aid to children in conflict with the law is discussed in part 7.5 of this Chapter. CSOs had suggested, in Section 54(5) of their Alternative Child Bill, that:

‘(5) A child arrested and charged with an offence shall have the right to free legal assistance and court representation [which] shall be accorded to him or her by the state or any other interested person or organization or institution.

(6) A child arrested and charged with an offence shall have the right to free assistance by an interpreter if he or she does not understand or speak the language used at the police or in court.’

Under international juvenile justice law, it is well established that children in conflict with the penal law should be accorded a fair trial, even more specific than adults in such a situation. In order for fair trial for children accused of or found guilty of infringing penal law to be effectively realized there must be adequate guarantee to the right of access to justice.<sup>1360</sup> This so principally because:

Access to justice is a paramount element of the right of a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective.<sup>1361</sup>

States are thus urged to: ‘Urgently examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes.’<sup>1362</sup> States are also obliged to ‘allocate adequate resources to judicial and law enforcement institutions to enable them to provide better and more effective fair trial guarantee to users of the legal process.’<sup>1363</sup>

However, the Government of Tanzania has failed to come up with provisions in the LCA setting out a comprehensive legal aid scheme and/or allocated adequate resources to judicial and law enforcement institutions to enable them ‘to provide better and more effective fair trial guarantee to users of the legal process in

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<sup>1360</sup> See Article 17(2)(c)(iii) of the ACRWC and Articles 20, 37(d) and 40(2)(b)(iii) of the CRC.

<sup>1361</sup> Article 9 of the Resolution on the Right to a Fair Trial and legal Assistance in Africa (the *Dakar Resolution*). The Dakar Resolution was adopted by the African Commission on Human and Peoples’ Rights in 1999.

<sup>1362</sup> Ibid.

<sup>1363</sup> Ibid.

Tanzania.<sup>1364</sup> Nonetheless, the Government of Tanzania has continued to provide legal aid only to persons accused of capital offences such as murder and treason.<sup>1365</sup>

### **7.5.5 Release or Detention of a Child Prior to Sentence**

It is a well-established rule of criminal law that where an accused person is brought before a police station or court, he or she should either be released on bail upon meeting bail conditions prescribed by law or detained where he or she fails to meet the conditions. This part, therefore, examines provisions relating to release and detention of children in conflict with the law as provided for in the LCA as well as other criminal procedural laws.

#### **7.5.5.1 The Right to Bail for a Child**

The right to bail is a well-entrenched principle of many modern criminal law statutes. In Tanzania, Section 148 of the Criminal Procedure Act (1985)<sup>1366</sup> guarantees this right and provides several conditions for an accused person to be admitted to bail. The application of this section was given judicial consideration in *DPP v Daudi s/o Pete*,<sup>1367</sup> where it was held, *inter alia*, that under Article 15(2)(a) of the Constitution of the United Republic of Tanzania (1977) a person may be denied or deprived of personal liberty under “certain circumstances” and subject to a ‘procedure prescribed by law.’ Then Section 148(5)(e) of the Criminal Procedure Act did not contain the requisite prescribed procedure for denying bail to an accused person; thus, according

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<sup>1364</sup> See UN Committee on the Rights of the Child, “Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania.” 02/06/2006, op. cit, paras. 70 and 71.

<sup>1365</sup> See particularly the Legal Aid (Criminal Proceedings) Act (1969), Cap. 21 R.E. 2002.

<sup>1366</sup> Ibid.

<sup>1367</sup> [1993] TLR 22.

to the Court of Appeal, Section 148(5)(e) of the Act therefore violated Article 15(2) of the Constitution. It was, consequently, declared unconstitutional.

In the LCA, the right to bail for offending children is entrenched in Section 101, which provides that:

101. Where a child is apprehended with or without a warrant and cannot be brought immediately before a Juvenile Court, the officer in charge of the police station to which he is brought shall –

- (a) unless the charge is one of homicide or any offence punishable with imprisonment for a term exceeding seven years;
- (b) unless it is necessary in the interest of that child [to] remove him from association with any undesirable person; or
- (c) unless the officer has reason to believe that the release of that child would defeat the ends of justice,

release such child on a recognizance being entered into by himself or by his parent, guardian, [and] relative or without sureties.

In principle, this provision seems to contain some safeguards to a child brought before a police station.<sup>1368</sup>

#### **7.5.5.2 Prevention of a Child to Associate with Adult Offenders**

In terms of Section 102 of the LCA, a ‘police officer shall make arrangements for preventing, so far as practicable, a child while in custody, from associating with an

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<sup>1368</sup> A more progressive proposal to this regard was made by CSOs in their Alternative Child Bill submitted to the Parliamentary Standing Committee (Community Development) in Dodoma on 28<sup>th</sup> April 2009. In Section 49(1), the Bill states that:

‘49.- (1) The police officer shall have the duty to ensure that the juvenile is always free to be granted bail, even if the juvenile does not have a person to bail him or her out, unless the police officer concerned is satisfied that-

- (a) It is necessary and in the best interest of the juvenile to remand him or her; or
- (b) The child might disappear.’

According to Section 49(2) of the CSO Alternative Bill: ‘No child shall be put in detention for more than 24 hours before being made to appear before a magistrate.’



adult charged with an offence unless he is a relative.’ The law requires a child to be removed from custody ‘where he is likely to associate with adult offenders and other undesirable influence.’<sup>1369</sup> This provision is concomitant to the provisions of Article 37(c) of the CRC, which provides that: ‘every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.’

Under Article 10(2)(b) of the International Covenant on Civil and Political Rights (ICCPR, 1966) it is provided that: ‘Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication.’ Similarly, under Rule 8(d) of the Standard Minimum Rules for the Treatment of Prisoners<sup>1370</sup> it is required that: ‘Young prisoners shall be kept separate from adults.’ Under paragraph 85 of General Comment No. 10 (2007) on “Children’s Rights in Juvenile Justice,”<sup>1371</sup> the CROC states that: ‘Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults.’

### **7.5.5.3 Remanding a Child**

Section 104 of the LCA contains provisions regulating the remanding process of a child. In particular, Section 104(1) provides that, where a Juvenile Court remands a

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<sup>1369</sup> *R v Njama Zuberi* (1985) TLR 241.

<sup>1370</sup> Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

<sup>1371</sup> CROC, General Comment No. 10 (2007): *Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10. Available at: <http://www.unhcr.org/refworld/docid/4670fca12.html> [accessed 16 January 2012].

child or commits a child for trial before the High Court and the child is not released on bail or is not permitted to go on large, it ‘may, instead of committing the child to prison, order him to be handed over to the care of the Commissioner, fit person or institution named in the order.’<sup>1372</sup> When this happens, the child should remain in the custody of that person or institution during the period mentioned in the order or until he or she is further dealt with according to law and shall be deemed to be in legal custody during that period.

Under paragraph 85 of General Comment No. 10 (2007), the CROC emphasises that the arrest, detention or imprisonment of a child must be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time<sup>1373</sup>; and, as such, no child shall be deprived of his/her liberty unlawfully or arbitrarily.<sup>1374</sup>

In particular, Article 37 of the CRC contains provisions governing the detention of juveniles outside the juvenile justice system. According to paragraph (b) of Article 37 of the CRC, ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.’ Where it is imperative to detain a child, such child should be entitled to a number of rights, including the rights to be treated with

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<sup>1372</sup> Rule 4 of the Law of the Child (Retention Homes) Rules (2012), GN. No. 151/2012, requires production of a court remand order to the manager before a child is admitted into a retention home.

<sup>1373</sup> Paragraph 85(a) of General Comment No. 10 (2007).

<sup>1374</sup> Ibid, para 85(b).

respect and without discrimination of any kind.<sup>1375</sup> Other rights to which a child in a retention home is entitled include the right to be provided with care that takes into account his individual needs, having regard to the child's age, gender, disability, health status and personal circumstances<sup>1376</sup>; the right to be provided with adequate nutrition, clothing and nurturing<sup>1377</sup>; the right to access to adequate preventive and remedial medical care<sup>1378</sup>; and the right to education and training appropriate to his or her age, level of maturity, aptitude and ability.<sup>1379</sup>

In addition, a child placed in a retention home is entitled to the rights to reasonable privacy (including possession and protection of his or her personal belongings)<sup>1380</sup>; to be informed of the behaviour that is expected of him or her and the consequences of his or her failure to meet those expectations<sup>1381</sup>; to be protected from all forms of violence, abuse, neglect and exploitation<sup>1382</sup>; and not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, including any cultural practice which dehumanises or is injurious to his or her physical and mental well-being.<sup>1383</sup> The child in a retention home is also entitled to the rights to a suitable amount of time for daily free leisure, exercise and play<sup>1384</sup>; to be consulted and to express his or her views, according to his or her abilities, about significant decisions

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<sup>1375</sup> The listed grounds of discrimination are gender, race, age, religion, language, political opinion, disability, health status, custom, ethnic origin, rural or urban background, birth, socio- economic status, being a refugee or other status. *See* particularly Section 5 of the LCA and Rule 4(1)(a) of Law of the Child (Retention Homes) Rules (2012), *op. cit.*

<sup>1376</sup> *Ibid*, Rule 4(1)(b).

<sup>1377</sup> *Ibid*, Rule 4(1)(c).

<sup>1378</sup> *Ibid*, Rule 4(1)(d).

<sup>1379</sup> *Ibid*, Rule 4(1)(e).

<sup>1380</sup> *Ibid*, Rule 4(1)(f).

<sup>1381</sup> *Ibid*, Rule 4(1)(g).

<sup>1382</sup> *Ibid*, Rule 4(1)(h).

<sup>1383</sup> *Ibid*, Rule 4(1)(i).

<sup>1384</sup> *Ibid*, Rule 4(1)(j).

affecting him or her<sup>1385</sup>; and to the necessary support and to an interpreter if language or disability is a barrier to consulting with them on decisions affecting his or her custody or care and development.<sup>1386</sup>

### **7.5.6 Procedure on Hearing in a Juvenile Court**

The procedure on hearing of cases in the Juvenile Court is set out in Sections 105-07, 109 and 110 of the LCA. Whereas Section 105 obliges the Juvenile Court on hearing a charge against a child to explain to him, in simple language, the particulars of the alleged offence, Section 106 requires the Juvenile Court after explaining the particulars of the alleged offence to ‘ask the child to make a statement on whether he has a cause to show why he should not be *convicted*.’<sup>1387</sup>

#### **7.5.6.1 The Problem with the Plea of Guilty in the Law of the Child Act**

One of the problematic provisions relating to the procedure in the Juvenile Court is Section 107 of the LCA, which simply states that: ‘Where the statement made by the child amounts to a plea of guilty the court may convict him.’ If not applied carefully by the courts due to their tender age and ignorance of the legal consequences of the sanctions relating to the offences with which they are charged, many children may

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<sup>1385</sup> Ibid, Rule 4(1)(k).

<sup>1386</sup> Ibid, Rule 4(1)(l).

<sup>1387</sup> Reference to the word “convicted” in this section is somewhat contrary to the spirit of the international standards on the administration of juvenile justice, which discourages reference to legal terms that may lead to labeling the child as a criminal. The word “conviction” is, thus, fit for adult offenders. It is accepted in international juvenile justice law that such a child should only be referred to as a child who has been found to have violated the penal law; not as convicted. This would augur well with the spirit of Section 119(1) of the LCA which prohibits sentencing a child found to have committed an offence to imprisonment. At this stage, it is important that a juvenile justice law should reinforce the need for a child to be held accountable and understand the implications of the harm caused by his or her criminal activity; rather than convicting and punishing him or her. *See* particularly Section 69(1) of the South African Child Justice Act.

find themselves being summarily convicted by the courts. It would be expected that this section ought to have set out some pre-requisites for such summary conviction. This would include the court warning and satisfying itself if – given the age and level of knowledge the child possesses as well as the circumstances of the case – the offending child possesses sufficient knowledge to know the impact of such plea of guilty.

This argument is backed up by the principles of conviction upon a plea of guilty as were enunciated by the High Court of Tanzania in *Buhimila Mapembe v R*,<sup>1388</sup> where Chipeta, J. (as he then was), *inter alia*, held that, in any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every element of it unequivocally. His Lordship was of the view that the words “it is true” when used by an accused person may not necessarily amount to a plea of guilty, particularly where the offence is a technical one.

In that case, His Lordship observed that the facts given by the public prosecutor could not be reasonably said to have amounted to full disclosure of the ingredients or elements of the offence, rather they appeared to be more of an allegation that the appellant had possession of the lion skin.

So, Section 107 of the LCA ought to have taken into account the likely danger of the court to rely on the child’s plea of guilty without taking into account the above prerequisites. This provision is likely to be abused by the courts as was the case in a

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<sup>1388</sup> [1988] TLR 174.

case decided by the Magu District Court in 1999<sup>1389</sup> where a nine-year old boy was convicted for life imprisonment on a plea of guilty. In that case, the accused was on 15<sup>th</sup> June, 1999 charged in the Magu District Court with the offence of rape contrary to Section 130 (1) and (2) (e) and Section 131 (2) (a) of the Penal Code<sup>1390</sup> as repealed and replaced by the Sexual Offences Special Provisions Act (1998).<sup>1391</sup>

At that time the accused was living with his parents at Nyalikungu Village, in Magu District. When the charge and facts were read by the prosecution before Hon. DMF Kamalamo (DM) the accused replied to the allegations thus: ‘I have heard the facts they are true and correct.’ On that basis, the court erroneously pronounced that: ‘Accused has been convicted on his plea of guilty to the charge.’

Thereafter, on the same date, the court, instead of pronouncing its sentence, Hon. Kamalamo (DM) ordered that:

After read (*sic*) the Act, which it is contradictory (*sic*) sentence has been reserved till after consultation with high level authority. In such circumstances sentence will be delivery (*sic*) after received (*sic*) report from High Court Mwanza (*sic*).

Upon that order, the court adjourned the case until 22<sup>nd</sup> June 1999 and admitted the accused to bail. When the case, once again, came up in court on 22<sup>nd</sup> June, 1999 before the same Magistrate the prosecutor, one Assistant Inspector Komba, prayed the court to pass the sentence as previously ordered by the court. Asked to mitigate the sentence, the accused child simply said: ‘I have nothing to say about the sentence.’ Consequently, the court passed the sentence in the following terms:

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<sup>1389</sup> *R v Mohamed Abdullah*, District Court of Magu, Criminal Case No. 116 of 1999.

<sup>1390</sup> Cap. 16 R.E. 2002.

<sup>1391</sup> Cap. 101 R.E. 2002.

I have taken into consideration that accused person (*sic*) is first offender (*sic*) regarding the gravity of the offence as it has been prescribed under the sexual offences special provision (*sic*) my hands are tied up I can't fold them on my head thinking about (*sic*) sentence to be imposed to the accused. Further this court had (*sic*) nothing to do other than imposing the sentence which has been prescribed by the statute which it (*sic*) is life imprisonment. In such circumstances under section 131 (3) of the sexual offences special provisions (*sic*) Act No. 4 of 1998, (*sic*) Accused is hereby sentenced to life imprisonment.

This conviction and sentence were, however, reversed by the High Court on revision,<sup>1392</sup> basically on the fact that the accused child was below the MACR and that the plea of guilty was equivocal.

#### **7.5.6.2 Examination of Witnesses in the Juvenile Court**

Examination of witnesses in both civil and criminal proceedings is a very crucial stage whereby parties are required to prove their respective cases through presentation of evidence in the form of testimony by their witnesses under oath/affirmation or presentation of relevant documents. Where witnesses are required to testify orally, they must either take oath or affirmation – i.e. swearing for Christians or affirming for Muslims (depending on their religious beliefs) to tell the truth and nothing but the truth.<sup>1393</sup>

In both criminal and civil proceedings, the examination of witnesses has three stages. First, after taking the oath, the witness is examined first by the party for whom the witness is called to testify or his advocate (i.e. examination-in-chief). At this level, the witness should not be asked leading questions. The primary object of

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<sup>1392</sup> This case (and its implications) is discussed at some considerable length in Legal and Human Rights Centre, *The State of Juvenile Justice in Tanzania*, op. cit, pp. 14-16.

<sup>1393</sup> See particularly *Busegi Kulwa v Celtel Tanzania Ltd.*, High Court of Tanzania (Labour Division) at Dar es Salaam, Labour Revision No. 33 of 2009 (unreported).

examination-in-chief is to let the witness adduce material facts which he knows and which the case of the party calling him wholly depends. Thus, the party calling the witness must extract as much of the material facts in his favour as the witness knows or remembers.

Second, the witness is cross-examined by the opposite party (i.e. cross-examination), whereby questions relevant to the dispute are asked by the opposite party. At this level, the other party may obtain additional information from the witness or challenge any aspect of the evidence given by the witness.<sup>1394</sup> As a general rule of practice on cross-examination in civil procedure, a party who fails to cross-examine a witness is rendered incompetent to ask the court to do so later.<sup>1395</sup> The main purpose of cross-examination is to test the accuracy and truthfulness of the witness, to destroy or weaken his evidence or show that the witness is unreliable, or to extract evidence that favours the cross-examining party.<sup>1396</sup>

Third, the witness may be re-examined by the party calling the witness (i.e. re-examination), whereby the calling party has a further opportunity to ask questions to the witness relating to issues dealt with during cross-examination. The purpose of re-examination is to repair the damage done by cross-examination.<sup>1397</sup> This is the last opportunity a witness has to clarify on vague statements or apparent contradictions revealed in cross-examination.

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<sup>1394</sup> Ibid. Rule 25(1)(b)(ii).

<sup>1395</sup> See particularly, *Paul Yustus Nchia v National Executive Secretary, CCM & Another*, Court of Appeal of Tanzania at Dar es Salaam, Civil Appeal No. 85 of 2005 (unreported).

<sup>1396</sup> See generally Chipeta, B.D., *Civil Procedure in Tanzania: A Student's Manual*. Dar es Salaam: Dar es Salaam University Press Ltd., 2002.

<sup>1397</sup> Rule 25(1)(c) of the Mediation and Arbitration Guidelines.



Section 109 of the LCA sets out the procedure for cross-examination of witnesses<sup>1398</sup> before the Juvenile Court. The section provides that at the close of the evidence of each witness, the Juvenile Court ‘shall put to the witnesses such questions as appears to be necessary or desirable, either for the purpose of establishing the truth or the facts alleged or to test the credibility of the witness.’ This section introduces the civil law procedure (as opposed to the common law adversarial procedure) of cross-examination where the court plays the role of the defence by asking the witnesses questions on behalf of the child. However, the section ought to have left a room for the child, if he or she possesses sufficient knowledge to be able to put questions to the witnesses, to do so; or to the child’s advocate or parent, guardian or relative in accordance with Section 108(2) of the LCA. This would guarantee the principle of *equality of arms* in the trial before the Juvenile Court.<sup>1399</sup>

Under paragraph 59 of its General Comment No. 10 (2007), the CROC states that the guarantee in Article 40(2)(b)(iv) of CRC ‘underscores that the principle of **equality of arms** (i.e. under conditions of equality or parity between defence and prosecution)

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<sup>1398</sup> In law, “cross-examination” is the interrogation of a witness called by one's opponent. It is preceded by “direct examination” or “examination-in-chief” and may be followed by a “re-direct” or “re-examination” of the same witness by the party who has called before the court such witness.

<sup>1399</sup> Indeed, one of the elements of the broader concept of a fair trial is the principle of equality of arms, which requires each party to be given a reasonable opportunity to present his or her case under conditions that do not place him or her at a substantial disadvantage vis-à-vis his opponent. *See*, among many authorities, *Niderost-Huber v Switzerland* [1997] ECHR 18990/91 at para 23, 18 February 1997. That right means, in principle, the opportunity for the parties to a trial to have knowledge of and comment on all evidence adduced or observations filed, with a view to influencing the court's decision (*see* particularly *Lobo Machado v Portugal* [1996] ECHR 15764/89 at para 31, 20 February 1996). This position is not altered when the observations are neutral on the issue to be decided by the court. (*See* particularly *Goc v Turkey* [2002] ECHR 36590/97 at para 55) or, in the opinion of the court concerned, they do not present any fact or argument which has not already appeared in the impugned decision. *See* also *SH v Finland* (App no 28301/03) [2008] ECHR 28301/03.

should be observed in the administration of juvenile justice.’ In the context of this paragraph, the term “to examine or to have examined” refers ‘to the fact that there are distinctions in the legal systems, particularly between the accusatorial and inquisitorial trials. In the latter, the defendant is often allowed to examine witnesses although he/she rarely uses this right, leaving examination of the witnesses to the lawyer or, in the case of children, to another appropriate body.’ However, the CROC notes, ‘it remains important that the lawyer or other representative informs the child of the possibility to examine witnesses and to allow him/her to express his/her views in that regard, views which should be given due weight in accordance with the age and maturity of the child (Art. 12).’<sup>1400</sup>

In practice, however, the right to “equality of arms” between the prosecution and defence can be said to be often honoured only in the breach. First, most of the international and local courts or tribunals simply allocate far more resources – financial, material, and human – to the prosecution than to the defence.<sup>1401</sup> To address this anomaly, most international tribunals, for instance the Special Court for Sierra Leone (SCSL), have embraced the idea that “equality of arms” means equality of *resources*, whereas the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) have said, following the latter’s decision in *Prosecutor v Kayishema*,<sup>1402</sup> “equality of arms” means only equality of *rights* between the prosecution and the defence.

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<sup>1400</sup> General Comment No. 10 (2007), op. cit.

<sup>1401</sup> For a detailed discussion on the application of the principle of equality of arms visit [Http://Lawofnations.Blogspot.Com/2006/02/Inequality-Of-Arms-At-International.Html](http://Lawofnations.Blogspot.Com/2006/02/Inequality-Of-Arms-At-International.Html) (accessed 26 January 2012).

<sup>1402</sup> Case No. ICTR-95-1-T, decided on 21<sup>st</sup> May 1999.

Under Section 110 of the LAC, it is provided that where after the prosecution witnesses have given evidence and the Juvenile Court is satisfied that the evidence before it established a *prima facie* case against the child the Juvenile Court ‘shall hear the witnesses for the defence and any further statement which the child may wish to make in his defence.’ This principle is, to a larger extent, in line with the provisions of Article 12(2) of the CRC, which requires that a child be provided with the opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly or through a representative or an appropriate body in a manner consistent with the procedural rules of national law.<sup>1403</sup>

#### **7.5.6.3 Child as a Witness**

The LCA has brought forth a very progressive element regarding the protection of the rights of a child who testifies in a court of law. According to Section 115(1) of the LCA, where in any cause or matter a child called as a witness does not, in the opinion of court, understand the nature of an oath, the evidence ‘may be received if in the opinion of the court, which opinion shall be recorded in the proceedings, the child is possessed of sufficient intelligence to justify the reception of the laws of evidence and understands the duty of speaking the truth.’ Under subsection (2) of Section 115 of the LCA, where evidence received by virtue of subsection (1) is given on behalf of the prosecution is not corroborated by any other material evidence in support of it implicating the accused the court ‘may after warning itself, act on that evidence to convict the accused if it is fully satisfied that the child is telling the truth.’

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<sup>1403</sup> See also para 43 of General Comment No. 10 (2007) on ‘Children’s Rights in Juvenile Justice,’ UN Committee on the Rights of the Child.

In the LCA there is a significant departure from the rules of evidence relating to the admissibility of evidence of a child of tender age. Under subsection (3) of Section 115 of the LCA it is provided that,

(3) Notwithstanding the provisions of this section, where in any criminal proceedings involving sexual offence<sup>1404</sup> the only independent evidence is that the child or victim of sexual offence, on its own merits, notwithstanding that such evidence is not corroborated, proceed to convict for reasons to be recorded in the proceedings, if the court is satisfied that the child is telling nothing but the truth.

Under the rules of evidence, the evidence of a “child of tender age”<sup>1405</sup> requires corroboration before it can be acted upon.<sup>1406</sup> This rule was given judicial consideration in *Said Hemed v R*.<sup>1407</sup> In that case, the principal witness for the prosecution was a child of tender years. In the learned High Court Judge's estimation of his age, at the time he appeared in the witness box in August 1986 the witness was between 9 and 10 years. Therefore, the witness was aged between 5 and 6 years at the time the offence (killing) took place. He gave unsworn evidence, the judge having got the impression, upon a *voire dire*<sup>1408</sup>, that he was sufficiently intelligent to justify the reception of his evidence, though he did not understand the nature of oath. However, the Court of Appeal was of a different opinion that,

<sup>1404</sup> In terms of subsection (4) of Section 115 of the LCA, ‘For the purposes of this section and any other written laws, “sexual offence” means any sexual offence as created by the Penal Code.’

<sup>1405</sup> Under Section 127(5) of the Evidence Act (1967), Cap. 6 R.E. 2002, a “child of tender age” means a child whose apparent age is not more fourteen years. This definition was confirmed by the Court of Appeal in *Hassani Hatibu v R*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 71 of 2002 (unreported).

<sup>1406</sup> In *Hassani Hatibu v R*, *ibid*, it was held that ‘it is imperative for the trial judge or magistrate when the witness involved is a child of tender age to conduct a *voire dire* examination. This is to be done in order for the trial judge of magistrate to satisfy himself or herself that the child understands the nature of an oath.’

<sup>1407</sup> [1987] TLR 117 (CA).

<sup>1408</sup> The judicial consensus on this matter is that where ‘in a criminal case involving the evidence of a child of tender age, the trial court does not conduct a *voire dire* examination in terms of Section 127 of the [Evidence] Act, the reception of such evidence is improper.’ *per* Lubuva, J.A. (as he then was) in *Hassani Hatibu v R*. See also *Jonas Raphael v R*, Court of Appeal of Tanzania at Dar es Salaam, Criminal Appeal No. 42 of 2003 (unreported).

As observed above, P.W.1 was aged between 5 and 6 years at the time of the killing. He came to give evidence in the High Court four years after the event when he had attained the age of 9 or 10 years. He was then schooling in Std. III. But this is the child who told the court that he did not know the names of his parents, and that he was not aware of the fact that his sister Esta has died. We are amazed in our judgement we are not satisfied that P.W.1 was possessed of sufficient intelligence. We therefore entertain serious misgivings about his recollection of the event.

We are fully apprehensive of the fact that we are sitting on appeal and that we have not had the opportunity of seeing or hearing the witness. But on the materials on record we strongly feel that the finding of the learned judge in respect of P.W.1's intelligence was not reasonably open to him and we are, therefore, obliged to disturb it. We take the view that as a matter of prudence the evidence of P.W.1 required corroboration before it could be acted upon.

Under paragraph 56 of its General Comment No. 10 (2007), the UNCROC urges that a child should not be 'compelled to give testimony or to confess or acknowledge guilt.' This is in line with Article 14(3)(g) of the ICCPR.

#### **7.5.7 Procedure upon Conviction**

The procedure upon conviction of a juvenile in the Juvenile Court is set out in Section 111 of the LCA. Under subsection (1) of this section it is provided that, where the child admits the offence and the Juvenile Court accepts its plea or after hearing the witnesses the Juvenile Court is satisfied that the offence is proved, the Juvenile Court 'shall convict the child and then, except in cases where the circumstances are so trivial as not to justify such a procedure, obtain such information as to his character, antecedents, home life, occupation and health as may enable it to deal with the case in the best interests of the child, and may put to him any question arising out of that information.' According to subsection (2): 'For the purpose of obtaining information or for special medical examination or observation, the Juvenile Court may remand the child or may release him on bail.'

Under paragraph 52 of its General Comment No. 10 (2007), the CROC ‘recommends that States Parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body.’ This recommendation is in line with the provisions of Article 37 of the CRC, which requires that children should be detained only as a measure of last resort and for the shortest appropriate period of time. This requirement is affirmed in Article 107A(2)(b) of the Constitution of Tanzania (1977), which obliges courts to expedite determination of cases as a general rule. In South Africa, Section 66 of the CJA gives effect to the constitutional right to a speedy trial contained in Section 35 of the Constitution of South Africa (1996)<sup>1409</sup>, by providing that ‘all trials must be concluded as speedily as possible with as few postponements as necessary.’<sup>1410</sup>

However, the LCA does not provide for a timeframe within which trials involving children would be finalised and sentence handed down. This timeframe would guarantee expeditious and certain disposition of cases in the Juvenile Court, particularly in a judicial system fraught with inordinate delays in determination of cases like Tanzania.<sup>1411</sup> For instance, in its first report<sup>1412</sup> released in December 2006,

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<sup>1409</sup> See also Section 28(1)(g) of the Constitution of South Africa.

<sup>1410</sup> See particularly Gallinetti, J., *Getting to Know the Child Justice Act*, op. cit, p. 51.

<sup>1411</sup> For a detailed account of the magnitude of the problem of delays of cases in Tanzanian courts, see particularly United Republic of Tanzania, *Financial and Legal Sector Upgrading Project (FILMUP)*, “Legal Sector Report,” Dar es Salaam: Government Printer, 1996; United Republic of Tanzania, *Legal Sector Reform Programme: Medium Term Strategy (2005/06-2007/08)*. Dar es Salaam: Government Printer, 2004; Ministry of Justice and Constitutional Affairs, *A Vision of Accessible and Timely Justice for All in the New Millennium*. Dar es Salaam: Government Printer, 2004; Mashamba, C.J., “Access to Justice and State Policy Considerations in Tanzania.” *The Justice Review*. Vol. II No. 2, 2006; United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing*

the Research and Analysis Working Group (RAWG), MKUKUTA Monitoring System, which was then under the Ministry of Planning, Economy and Empowering (MPEE), observed that:<sup>1413</sup>

Administration of justice should be expedited. There is a backlog of unresolved criminal and civil disputes, and the number of trained legal personnel is insufficient. Data indicates that the percentage of people held in remand for more than two years is 15.7 percent in 2005. The target is 7.5%. Given the overcrowding in prisons, reducing this number could help to ease congestion.<sup>1414</sup>

The fixing of a certain timeframe within which a case is disposed of has been embedded in the current labour law regime in Tanzania – within 30 days for mediation<sup>1415</sup> and arbitration<sup>1416</sup> – and it has proved to be quite useful in expeditious determination of labour cases both in the Commission for Mediation and Arbitration (CMA) and the High Court (Labour Division).<sup>1417</sup> In the absence of a fixed timeframe for disposal of cases in the Juvenile Court one expects to see inordinate delays in determination of cases in the Juvenile Court as it is the case in the ordinary courts.

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*and Governance in Tanzania.* Dar es Salaam: Research and Analysis Working Group, MKUKUTA Monitoring System (then under the Ministry of Planning, Economy and Empowering), 2006; and Mashamba, C.J., “Overview of the Implementation of Cluster III of MKUKUTA: Governance and Accountability.” *The Justice Review*. Vol. IV No. 5, 2007.

<sup>1412</sup> This report aimed at providing an analysis using national set of indicators revised in 2005/06 under Tanzania’s National Strategy for Growth and Reduction of Poverty (better known in Kiswahili, *Mkakati wa Kukuza Uchumi na Kuondoa Umaskini Tanzania*, MKUKUTA).

<sup>1413</sup> See United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania*, op. cit.

<sup>1414</sup> Ibid, p. 27.

<sup>1415</sup> See particularly sections 86 of the Employment and Labour Relations Act (Act No. 6 of 2004), Cap. 366 R.E. 2002.

<sup>1416</sup> Ibid, Section 88(9), which provides that: ‘Within thirty days of the conclusion of the arbitration proceedings, the arbitrator shall issue an award with reasons signed by the arbitrator.’ See also Rules 18 (3) and 22 of the Labour Institutions (Mediation and Arbitration Guidelines) Rules (2007), GN. No. 67 dated 23<sup>rd</sup> Mach 2007.

<sup>1417</sup> See particularly *Buzwagi Project v Antony Lameck*, High Court of Tanzania (Labour Division) at Mwanza, Revision N0. 297 of 2008 (unreported); and *21<sup>st</sup> Century Food & Packaging Ltd. v Emmanuel Mzava Kimweli*, High Court of Tanzania (Labour Division) at Dar es Salaam, Revision No. 158 of 2008 (unreported).

### **7.5.8 Disposition of Cases and Placement of a Child**

Section 116 the LCA sets out procedure for committing a “convicted” child to custodial sentence. On the face of the section – particularly from the reading of the title of the section, i.e. “custodial sentence” – it seems that custodial sentence is the most preferred sentence. This would seem to be contrary to Article 37(b) of the CRC, which emphasizes that in the disposition phase of the proceedings, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate period of time. Under paragraph 28 of General Comment No. 10 (2007), the CROC requires that when judicial proceedings are initiated by a competent authority against the juvenile: ‘the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pre-trial detention, as a measure of last resort.’

According to para 28 of General Comment 10: ‘This means that States parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention.’ However, the provisions of section 116 actually provides for alternative or diversionary measures to deal with “convicted” offending children. The section provides for such alternative sentences like conditional discharge and probation.



### **7.5.8.1 Conditional Discharge**

Section 116(1) the LCA vests powers in the Juvenile Court to make an order of conditional discharge, instead of committing the offending child to custodial sentence. This section requires that where a child is convicted of an offence other than homicide, the Juvenile Court ‘may make an order discharging the offender conditionally on his entering into recognizance, with or without sureties, to be of good behaviour during such period not exceeding three years, as specified in the order but if a child has demonstrated good behaviour then that child shall be presumed to have served the sentence.’

### **7.5.8.2 Probation Orders**

Another provision that can be used as one of the diversionary measure at the stage of disposition of a case in the Juvenile Court is the one relating to the grant of a probation order. This is provided for in Section 116(2) of the LCA, which categorically stipulates that,

116.- (2) A recognizance entered into under [subsection (1) of] this section shall, if the court so orders, contain a condition that the child be under the supervision of parent, guardian, relative or social welfare [officer] as may be named in the order during the period specified in the order, if that person is willing to undertake the supervision, and such other conditions for securing the supervision as may be specified in the order.

Under subsection (3) of Section 116 of the LCA, the person named in the probation order ‘may at any time be relieved of his duties and, in that case or in the case of the death of a person so named, another person may be substituted by the Juvenile Court before which the child is bound by his recognizance to appeal for conviction or sentence.’

In principle, the probation order means that the child is not put in a penal institution, under the condition that he/she will behave well and regularly report to a probation officer. If the child fails to behave well, the court may later decide to detain him/her in a child penal institution. Before making a probation order, the court should be advised by a social welfare officer. If the court finds a child guilty of an offence, it should be able to place the child under custody of some other person or family instead of prison custody. If the court finds a child guilty of an offence, it should be able to place that child under supervision of: a probation officer, or a 'fit person/institution' so appointed by the court, or a village authority (i.e., the village/area executive officer).

At the time of the enactment of the LCA, it was also proposed that a child should not be separated from his or her parents, unless the circumstances of the case make this necessary.<sup>1418</sup> It was proposed further that the placement of a child in an institution in any case should be a disposition of last resort; and where it is imperative to place the child in an institution, it shall be for a minimum period.<sup>1419</sup>

#### **7.5.8.3 Procedure Relating to a Child's Failure to Observe Release Conditions**

As noted above, Section 116 of the LCA sets out circumstances in which the court may release a child on prescribed conditions. Such release may be in the form of conditional discharge or on a probation order. Where a child so released fails to observe the release conditions imposed by the court under Section 116 he or she may face sanctions set out in Section 117 of the LCA. As such, where the Juvenile Court

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<sup>1418</sup> Section 60(3) of the CSO Alternative Bill.

<sup>1419</sup> Ibid, Section 60(4).

is satisfied by information on oath that the child has failed to observe any of the conditions of his recognizance, it should issue summons to the child or young person and his sureties, if any, requiring him or them to attend at such court and at such time as may be specified in the summons.<sup>1420</sup> Upon summoning the child or his sureties, the Juvenile Court before which a child is bound by his recognizance to appear for sentence, on being satisfied that he has failed to observe any condition of his recognizance, may forthwith deal with child as for the original offence.<sup>1421</sup>

#### **7.5.8.4 Power to Order Parent to Pay Fine Instead of a Child**

The LCA empowers the Juvenile Court, upon convicting a child of any offence, to impose an order for payment of a fine, compensation or costs; instead of committing the child to custodial placement. This is particularly done where the court is of the opinion that the case would be best disposed of in the best interests of the child by the imposition of a fine, compensation or costs, whether with or without any other punishment. Considering the fact that a child is legally incapable of possessing property, including those in monetary form, the LCA vests power in the Juvenile Court to order a parent, guardian or relative of the convicted child to pay fine, compensation or costs instead of the child.<sup>1422</sup> However, a parent, guardian or relative may not be compelled to pay fine where the court is satisfied that he or she

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<sup>1420</sup> Section 117(1) of the LCA.

<sup>1421</sup> Ibid, Section 117(2).

<sup>1422</sup> In *Marcela Barthazar v Hussein Rajab* (1986) TLR 8 (HC) the High Court held that a compensation order in respect of a convicted juvenile may in an appropriate case only be made against a parent or guardian of the child or young person. It cannot be made against the juvenile.

cannot be found; or where it is satisfied that he or she has not contributed the commission of the offence by neglecting to exercise due care of the child.<sup>1423</sup>

Before the Juvenile Court issues an order for fine, compensation or costs, it must give the concerned parent, guardian, or relative an opportunity of being heard.<sup>1424</sup>

Where parent or guardian is aggrieved by the order, he or she may appeal against such order.<sup>1425</sup>

The provisions are similar to Section 27 (3) of the Penal Code, which allows the court to order that a convicted person should pay fine as an alternative to custodial imprisonment. This section provides that: ‘A person liable to imprisonment may be sentenced to pay a fine in addition to, or instead of, imprisonment.’ In *Salum Shaaban v R*.<sup>1426</sup> Mtenga, J. (he then was) stated the rationale for paying fine instead of custodial imprisonment, explaining that fine:

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<sup>1423</sup> Section 118(1) of the LCA. Before the enactment of the LCA, compensation in respect of convicted juveniles was governed by Section 21 of the Children and Young Persons Act, Cap. 13. In *Marcela Barthazar v Hussein Rajab*, *ibid*, the respondent's child sustained some injury at the hands of the child of the appellant. The trial court found the appellant's child liable and, *inter alia*, ordered the respondent to pay compensation. The High Court found to be ‘undesirable to order the appellant to pay any compensation.’ According to the High Court, the parties’ children, who were neighbours, were attending school and, at the material time, ‘they were coming from school together with other school children. There was no evidence or indication from the evidence that the appellant in any way conduced to the commission of the offence by neglecting to exercise due care of her offending child. The incident was a result of common trivial school children's playful squabbles for which it is wrong, of itself, to hold parents or guardians responsible by way of payment of compensation. It is neither conducive to, nor shall it promote, good and amicable neighbourly relations.’

<sup>1424</sup> Section 118(2) of the LCA. In *Marcela Barthazar v Hussein Rajab*, *ibid*, reinforcing this provision, which is similar to Section 21(2) of the repealed Children and Young Persons Act, the High Court held that: ‘a court may not order a parent to pay a fine or compensation or costs without giving the parent an opportunity to be heard.’ In *Ramadhani Mwenda v Republic* 1989 TLR 3 the High Court held that if a sentencing court is minded to impose a sentence of fine as an option to a custodial sentence, such court should take pains to inquire into the financial means of the accused. *See also Ally and others v R* [1972] HCD n. 115.

<sup>1425</sup> *Ibid*, Section 118(4).

<sup>1426</sup> [1985] TLR 71.

... is an option given by the legislature which therefore means that in imposing a sentence, the court must ascertain that a sentence of fine should first be imposed and in default of payment of such fine, then a sentence of imprisonment can be given ... In imposing a sentence of fine the court must ascertain that the fine can be paid rather than impose a sentence which cannot be paid and as a result the accused goes to jail.<sup>1427</sup>

In *Nyakulima d/o Chacha v R.*<sup>1428</sup> Mohan, J. (as he then was) observed that: ‘The principle is that a fine should be one which an accused person can reasonably be expected to pay.’

However, the problematic provision in Section 118 is subsection (3) which entails recovery of the imposed fine, compensation or costs by any means, including by distress against, or imprisonment of, the defaulting parent, guardian or relative. The subsection categorically provides that:

(3) Any sum imposed or ordered to be paid by a parent, guardian, or relative may be recovered from him by distress or imprisonment in like manner if the order had been made on the conviction of the parent, guardian or relative of the child with [which he] was charged.

This offends the international juvenile justice standards. Under paragraph 55 of its General Comment No. 10 (2007), the CROC ‘regrets the trend in some countries to introduce the punishment of parents for the offences committed by their children.’ The CROC also elaborates that: ‘Civil liability for the damage caused by the child’s act can, in some limited cases, be appropriate, in particular for the younger children (e.g. below 16 years of age).’ But the CROC discourages criminalizing parents of children in conflict with the law, because it will ‘most likely not contribute to their becoming active partners in the social reintegration of their child.’ So, the provisions

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<sup>1427</sup> Ibid, at p. 73.

<sup>1428</sup> 1 T.L.R. 341.

of subsection (3) of Section 118 of the LCA ought to be reconsidered with a view to being amended in the context of paragraph 55 of General Comment 10.

### 7.5.9 Alternative Sentences

The LCA progressively prohibits the imposition of the sentence of imprisonment on a child found guilty of an offence.<sup>1429</sup> As the High Court held in *R. v Asia Salum and Another*<sup>1430</sup>, as a rule, youthful offenders should not be sentenced to terms of imprisonment, where there is an opportunity to mix with and learn bad habits from more seasoned criminals.<sup>1431</sup> According to the High Court, the imprisonment only serves to bring the child ‘into contact with hard core criminals and make him more of a criminal by the time he left the prison than when he entered it.’

Instead, subsection (2) of Section 119 provides that, where a child is convicted of any offence punishable with imprisonment, the court may impose any other alternative order<sup>1432</sup>, which may be made under the LCA.<sup>1433</sup> Such alternative orders

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<sup>1429</sup> Section 119(1) of the LCA.

<sup>1430</sup> (1986) TLR 12.

<sup>1431</sup> The principle that youthful offenders should not be sentenced to terms of imprisonment is also evident from the decision of this court in *R. v Teodosio s/o Alifa* [1967] HCD 216.

<sup>1432</sup> This provision is more progressive than the provisions of Section 22(2) of the repealed Children and Young Persons Act, which provided that: ‘No young person shall be sentenced to imprisonment, unless the court considers that, none of the other methods in which the case may be legally dealt with, by the provisions of this or any other Ordinance, is suitable.’ (Emphasis supplied). The highlighted phrase gave an opportunity for many trial magistrates to sentence children to imprisonment. See particularly *R. v John s/o Gilied* (1984) TLR 273.

<sup>1433</sup> In *R. v Fidelis John* (1988) TLR 165, the accused child was convicted on his plea of guilty for escaping from lawful custody and was sentenced to six months’ imprisonment and six strokes of the cane. On revision, the High Court held, *inter alia*, that the trial court had no legal justification to sentence the accused to 6 months’ imprisonment. The trial court ought to have resorted to the alternative forms of punishment provided for juvenile offenders. Accordingly the sentence of 6 months imprisonment was quashed and set aside; and the accused child was set at liberty forthwith. However, the High Court blessed the trial court’s sentence of 6 strokes of the cane imposed on the accused, saying that it ‘meets the justice of the case.’ Although corporal punishment is allowed in the

include: discharging the child without making any order<sup>1434</sup>; ordering the child to be repatriated, at the expense of the Government, to his or her home or district of origin if it is within Tanzania<sup>1435</sup>; or ordering the child to be handed over to the care of a fit person or institution named in the order, if the person or institution is willing to undertake such care.<sup>1436</sup>

This provision is more or less similar to the provisions of Article 37(b) of the CRC, which provides that: ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.’ Essentially, these principles would provide guidance to the sentencing Juvenile Court to deal with the matter in the best interests of the child.

The LCA also contains provisions that regulate the procedure relating to the commitment of a convicted child to an approved school established under Section 121 of the LCA. This is particularly set out in Section 120(1) of the LCA, which requires that where a child is convicted of an offence which if committed by an adult would have been punishable by a custodial sentence, the court may order<sup>1437</sup> that child be committed to custody at an approved school. However, an order committing a convicted child to an approved school ‘shall not be made unless the patron of the approved school to which the child is to be committed has informed the Juvenile

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Tanzanian juvenile justice system, international children’s rights law prohibits it. *See* particularly, Article 37 of the CRC; and Article 17(1) and (2)(a) of the ACRWC.

<sup>1434</sup> Ibid, Section 119(2)(a).

<sup>1435</sup> Ibid, Section 119(2)(b).

<sup>1436</sup> Ibid, Section 119(2)(c).

<sup>1437</sup> Under subsection (3) of Section 120 of the LCA, the order made under this section is referred to as “an approved school order”.

Court that he has a vacancy which may be filled by the person in respect of whom it is proposed to make the order.’<sup>1438</sup>

## **7.6 Inherent Gaps in the LCA Relating to Protection of Children in Conflict with the Law**

Although it has been hailed as one of the greatest achievements of the fourth phase Government in protection of children’s rights in Tanzania,<sup>1439</sup> the LCA has several gaps in relation to the protection of children in conflict with the law. This aspect was noted by some circles during the public hearing on the Bill to enact the LCA, but the Government paid a deaf ear to this plea.<sup>1440</sup> Notably, one of the serious gaps is lack of a clear list enumerating the standards constituting the best interest of the child.<sup>1441</sup> Unlike the LCA, the Zanzibar Children’s Act (2011)<sup>1442</sup> and the South African Children’s Act (2005)<sup>1443</sup> contain a clear enumeration of factors constituting the best interests of the child.

There is also lack of a clear listing of the diversion measures at each stage of the administration of juvenile justice (as enumerated in the South African CJA); as well as lack of the obligation of the government to provide legal assistance to children in

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<sup>1438</sup> Ibid, Section 120(2).

<sup>1439</sup> See, for instance, the statement of UNICEF’s Tanzania Representative, Heimo Laakkonen, made at the public hearing on the Bill to enact the Law of the Child (2009) organised by the Parliamentary Standing Committee (Community Development) at Karimjee Hall in Dar es Salaam on 7<sup>th</sup> and 8<sup>th</sup> October 2009. ‘This is a huge step forward,’ said the UNICEF Representative after witnessing the passage of the bill through Parliament on 4<sup>th</sup> November 2009 following two days of deliberation. ‘With the 20th anniversary of the Convention on the Rights of the Child just around the corner, this gives us, and Tanzania’s children, two monumental achievements to celebrate!’ he said. This statement is available at [http://www.unicef.org/infobycountry/tanzania\\_51662.html](http://www.unicef.org/infobycountry/tanzania_51662.html) (accessed 18 December 2011).

<sup>1440</sup> See particularly “CSOs’ Addendum Position Paper presented to the Parliamentary Standing Committee (Community Development)” at Dodoma Bunge Premises on 3<sup>rd</sup> November 2009.

<sup>1441</sup> Ibid.

<sup>1442</sup> See particularly section 4 of the Zanzibar Children’s Act (2011).

<sup>1443</sup> See particularly section 7 of the South African Children’s Act (2005).



conflict with the law.<sup>1444</sup> The law also has failed to provide explicit provisions regarding the establishment and functioning of the juvenile court in every region of Tanzania Mainland. In this regard, the law has failed to address the question of seriousness in establishing juvenile courts around and across the country, now that the country has only one juvenile court at Kisutu in Dar es Salaam. Further, the law does not abolish corporal punishment imposed on children, particularly in the administration of the juvenile justice system. The LCA also does not establish a central body to coordinate the work and functions of the juvenile justice agencies and actors: the police, judiciary, (the prisons department<sup>1445</sup>), the social welfare department as well as civil society organisations working with and for children in the country.<sup>1446</sup>

## **7.7 Provision of Legal Assistance to Children in Conflict with the Law**

Under international juvenile justice law, it is well established that children in conflict with the penal law should be accorded a fair trial, even more specific than adults in

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<sup>1444</sup> See particularly Mashamba, C.J., “Introduction to the Tanzanian Law of the Child Act (2009).” A paper presented at a training of Legal and Human Rights Centre (LHRC) Staff on the Child Law Organized by the Directorate of Advocacy and Reforms of the LHRC, held in Dar es Salaam on 23 June 2010.

<sup>1445</sup> The prisons department is included here as a juvenile justice agency as it currently holds most of the remanded and imprisoned children in Tanzania as a result of lack of Retention Homes and Approved School as discussed in Section 7.2 above.

<sup>1446</sup> Only recently a loose Child Justice Forum (CJF) was set up under the coordination of the Ministry of Constitutional and Legal Affairs (MoCLA). The CJF, which is a result of the recommendations made in two studies (on juvenile justice and on access to justice for under 18’s) conducted by nola and Coram Children Legal Centre (Essex University, UK) under UNICEF funding, adopted a five-year Strategy in February 2012 that would ensure, *inter alia*, that activities and programmes undertaken by stakeholders are adequately improved and coordinated.

such a situation.<sup>1447</sup> According to Article 11 of the Resolution on the Right to a Fair Trial and Legal Assistance in Africa (the “Dakar Resolution”) of 1999,<sup>1448</sup>

### 11. Children and Fair Trial

Children are entitled to all the fair trial guarantees and rights applicable to adults and to some additional protection. The African Charter on the Rights and Welfare of the Child requires that: ‘Every child accused of or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect of human rights and fundamental freedoms.’<sup>1449</sup>

#### 7.7.1 State Obligation to Provide Legal Assistance to Offending Children

In order for fair trial for children accused of or found guilty of infringing penal law to be effectively realized there must be adequate guarantee to the right of access to justice.<sup>1450</sup> This is so principally because: ‘Access to justice is a paramount element of the right of a fair trial. Most accused and aggrieved persons are unable to afford legal services due to the high cost of court and professional fees. It is the duty of governments to provide legal assistance to indigent persons in order to make the right to a fair trial more effective.’<sup>1451</sup>

States are thus urged to: ‘Urgently examine ways in which legal assistance could be extended to indigent accused persons, including through adequately funded public defender and legal aid schemes.’<sup>1452</sup> States are also obliged to ‘allocate adequate

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<sup>1447</sup> See particularly Mashamba, C.J., “Tanzania's Obligations for Juvenile Justice Reform in the Contexts of the Juvenile Justice and Access to Justice Studies under the CRC/ACERWC.” A briefing paper presented at the Child Justice Forum, Bagamoyo, 13 September 2011.

<sup>1448</sup> Dakar Resolution, op. cit.

<sup>1449</sup> See also Guidelines (H) and (O) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, 2003, adopted by the African Commission on Human and Peoples’ Rights in 2003.

<sup>1450</sup> See Article 17(2)(c)(iii) of the ACRWC and Articles 20, 37(d) and 40(2)(b)(iii) of the CRC.

<sup>1451</sup> Article 9 of the Dakar Declaration, op. cit.

<sup>1452</sup> Ibid.

resources to judicial and law enforcement institutions to enable them to provide better and more effective fair trial guarantee to users of the legal process.’<sup>1453</sup>

However, as of now the Government of Tanzania has not set out any comprehensive legal aid scheme or allocated any adequate resources to judicial and law enforcement institutions to enable them ‘to provide better and more effective fair trial guarantee to users of the legal process in Tanzania,’<sup>1454</sup> except only for persons accused of capital offences such as murder and treason. The right is guaranteed and granted, by virtue of the provisions of Section 310 of the Criminal Procedure Act (1985).<sup>1455</sup>

According to Section 3 of the Legal Aid (Criminal Proceedings) Act (1969),<sup>1456</sup> the Chief Justice or a judge of the High Court may certify that a certain accused person should be extended free legal aid throughout the proceedings facing him or her where it appears to the certifying authority that ‘it is desirable, in the interest of justice that an accused should have legal aid in preparing and conduct of his defence or appeal and that his means are insufficient to enable him to obtain such aid.’<sup>1457</sup>

Due to this serious omission, the CROC has urged the Government of Tanzania, *inter alia*, to first: ‘Ensure that persons under 18 years of age in conflict with the law have

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<sup>1453</sup> Ibid.

<sup>1454</sup> See UN Committee on the Rights of the Child, “Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United republic of Tanzania.” 02/06/2006, op. cit, paras. 70 and 71.

<sup>1455</sup> Act No. 9 of 1985 (Cap. 20 R.E. 2002).

<sup>1456</sup> Act No. 21 of 1969 (Cap. 21 R.E. 2002).

<sup>1457</sup> This provision was determined in *The Judge i/c High Court (Arusha) and A.G. v N.I. Munuo Ng’uni*, Court of Appeal of Tanzania at Arusha, Civil Appeal No. 45 of 1998 (unreported). See also *N.I. Munuo Ng’uni v The Judge i/c High Court (Arusha) and the Attorney General*, High Court of Tanzania at Arusha, Civil Cause No. 3 of 1995 [unreported].

access to legal aid as well as independent and effective complaints mechanisms.’<sup>1458</sup>

Second, to: ‘Improve child-sensitive court procedure in accordance with the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (annexed to Economic and Social Council resolution 2005/20 of 22 July 2005).’<sup>1459</sup>

### **7.7.2 Provision of Legal Assistance to Offending Children by “Other Actors”**

From the foregoing explanation, where states are incapable of fulfilling their obligation to provide legal aid to the indigent and vulnerable persons, like children, the ‘contribution of the judiciary, human rights NGOs and professional associations should be encouraged.’<sup>1460</sup> In Tanzania, though, most of the legal aid NGOs that exist provide legal assistance to persons having civil cases<sup>1461</sup>, not criminal cases.<sup>1462</sup> In this case, thus, children in conflict with the penal law are not yet included in the schemes of existing legal aid providers. It would be important for any meaningful child’s rights-centred approach to assisting children, like the one undertaken by many children’s rights and legal aid NGOs, to take initiatives to providing legal assistance to juveniles in conflict with the penal law in Tanzania. This would help to minimize the inherent sufferings of juvenile delinquents in the country’s criminal justice system, as elaborated in this Chapter.

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<sup>1458</sup> CROC, “Consideration of Reports submitted by States Parties under Article 44 of the Convention – Concluding Observations of the Committee on the Rights of the Child: United Republic of Tanzania.” 02/06/2006, op. cit, para. 71.

<sup>1459</sup> Ibid.

<sup>1460</sup> Article 9 of the *Dakar Declaration*, op cit.

<sup>1461</sup> See generally ST Associates-Process Consultants & Facilitators, “Final Report for Baseline Survey on Tanzania Mainland and Zanzibar for Legal Service Facility: ID: LSF 001 BLST CSTA.” Dar es Salaam, Legal Service Facility, 2012.

<sup>1462</sup> In certain cases, **nola** has been providing legal assistance to a limited number of juvenile delinquents. On its part, the Women’s Legal Aid Centre (WLAC) is running a pilot legal aid project for children at the Kisutu Juvenile Court in Dar es Salaam.

## 7.8 Conclusion

This Chapter has discussed the protection of the rights of the child in conflict with the law in Tanzania in the context of the existing international instruments on juvenile justice. It has briefly examined how the foregoing development in international law has influenced many countries in the world to domesticate international standards on the administration of juvenile justice, Tanzania being amongst them. In Tanzania, the LCA has contained provisions regulating the administration of juvenile justice.

Although the LCA has been recognised as progressive, it has failed to address certain, critical areas of the administration of the juvenile justice system. These include lack of clear provisions setting out diversion measures for child offenders at all stages of the administration of the juvenile justice system. The LCA has also failed to provide for the right to legal aid for offending children. It is, therefore, urged that the Government should work on the gaps inherent in the LCA. It is also urged that the Chief Justice (the CJ)<sup>1463</sup> should ensure that the rules of procedures in the Juvenile Court are made as soon as possible now that the LCA has become operational.<sup>1464</sup> In this process, the CJ should widely consult stakeholders involved in the administration of the juvenile justice system.

In order for the law to be effectively enforced, the Government should ensure that concerned personnel are adequately trained in the administration of the juvenile

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<sup>1463</sup> Section 99(1) of the LCA empowers the Chief Justice to make rules to regulate the procedure in the Juvenile Court.

<sup>1464</sup> The LCA entered into force on 1<sup>st</sup> April 2010.

justice system in the context of the LCA and the above-discussed international instruments on the administration of juvenile justice. To this end, members of the public should as well be made aware on the basic elements of the law in order for them to observe the law, hence promote and protect the rights of children in conflict with the law.

## CHAPTER EIGHT

### 8.0 GENERAL OBSERVATIONS, RECOMMENDATIONS AND CONCLUSION

#### 8.1 General Overview

This thesis has strived to comparatively examine the administration of the juvenile justice systems in South Africa and Tanzania in the context of international juvenile justice law. The central focus of this study was the extent to which both South Africa and Tanzania have domesticated international juvenile justice norms as both countries have ratified the major international children's rights instruments – the CRC and the ACRWC.<sup>1465</sup> It has focused on the influence of the international children's rights instruments in the law reform processes relating to juvenile justice in both countries.<sup>1466</sup>

The rationale for this comparative examination of administration of the juvenile justice systems in Tanzania and South Africa is premised in the fact that both countries share a significant number of similarities as well as differences in sub-Saharan Africa. Both countries follow the common law system<sup>1467</sup> as well as they have a high rate of crimes committed by children and young people, with South Africa having a higher rate, which is amongst the leading countries in the world.<sup>1468</sup>

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<sup>1465</sup> Considered in Chapters 5, 6 and 7.

<sup>1466</sup> Considered in Chapters 6 and 7.

<sup>1467</sup> However, South Africa blend the common law system with a mixed Roman-Dutch system.

<sup>1468</sup> See for instance, Steyn, F., *Review of South African Innovations in Diversion and Reintegration of Youth at Risk*. Claremont: Open Society Foundation for South Africa, 2005; Dissel, A., "Youth, Crime and Criminal Justice in South Africa." *The World Bank Legal Review: Law, Equity and Development*. Vol. 2, 2006, pp, 236-261; and Legal and Human Rights Centre, *The State of Juvenile Justice in Tanzania*. Dar es Salaam: Legal and Human Rights Centre, 2003.

In both countries, crimes continue to threaten the personal safety, socio-emotional health and economic growth of their citizens, particularly those living in poor and criminogenic environments (i.e., environment conducive to crime).<sup>1469</sup>

Although both countries have only domesticated international children's rights norms in their jurisdiction in the past ten years<sup>1470</sup>, South Africa has taken a more progressive incorporation of international children's rights norms<sup>1471</sup> as compared to Tanzania.<sup>1472</sup> Whereas South Africa has adopted a separate law on child justice, Tanzania has adopted a composite law, incorporating provisions for the protection and promotion of children's rights in the same text with provisions relating to children in conflict with the law.

All in all, this thesis has noted that the enactment of child justice-specific laws in South Africa and Tanzania has been influenced by the development in international children's rights law that emphasises the need for special legal protection of children in conflict with the law at the domestic level. This development in international law has emphasised adopting a juvenile justice approach that views children as beneficiaries of rights in the criminal justice system rather than reflecting either a justice or a welfare approach view which regards children as non-beneficiaries of rights. This Chapter, therefore, summarizes the general observations and conclusions drawn in this thesis.

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<sup>1469</sup> Steyn, *ibid*, p. 1.

<sup>1470</sup> Interestingly, both the Tanzanian LCA and the South African CJA became operational on 1<sup>st</sup> April 2010.

<sup>1471</sup> Considered in Chapters Five and Six.

<sup>1472</sup> Considered in Chapters Five and Seven.



## 8.2 Observations

The observations and conclusions drawn in this Chapter revolve around the main theme of this thesis: i.e. the extent to which both South Africa and Tanzania have domesticated international juvenile justice law and the extent to which the norms and standards enshrined in the newly enacted juvenile justice laws are implemented. The Chapter also summarizes the challenges and prospects in the effective implementation of these laws.

### 8.2.1 The Place of Human Rights and Juvenile Justice in the Administration of the Criminal Justice System

This thesis has examined the essentials of criminal justice as it impacts on human rights and juvenile justice. In this context, the thesis has analysed the relationship between criminal justice and juvenile justice, as the concept and practice of juvenile justice derived from developments in the criminal justice system in the 19<sup>th</sup> century after the first juvenile court was established in Chicago in 1899.<sup>1473</sup> The thesis has discussed the place of human rights and juvenile justice in the administration of the criminal justice system, in the context that the former are premised on the need to

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<sup>1473</sup> For a detailed account of the early development of the juvenile courts in the US, see particularly Pitts, J., "Youth Justice in England and Wales." In Mathews, R. and J. Young (eds.), *The New Politics of Crime and Punishment*. Oregon: William Publishing, 2003. Pp. 71-99; Butts, J.A., "Can we do Without Juvenile Justice?" *Criminal Justice Magazine*. Vol.15 No. 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/15-1\\_jb.html](http://www.abanet.org/crimjust/juvjus/cjmag/15-1_jb.html) (accessed 6 January 2011); Shepherd, R.E., Jr., "Still Seeking the Promise of Gault: Juveniles and the Right to Counsel." *Criminal Justice Magazine*. Vol.15 Issue 1, Spring 2000. Available at [www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html](http://www.abanet.org/crimjust/juvjus/cjmag/18-2shep.html) (accessed 6 January 2011); Inciardi, J., *Criminal Justice*. 7<sup>th</sup> edn. New York/Oxford: Oxford University Press, 2002; Pickett, R.S., *House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857*. Syracuse: Syracuse University Press, 1969; Regoli, R.M. and J.D. Hewitt, *Delinquency in Society*. 4<sup>th</sup> edn. Boston: McGraw-Hill, 2000; Odongo, G.O., "The Domestication of International Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context." LL.D. Thesis, University of Western Cape, 2005; Hoghuhi, M., "The Juvenile Delinquent has Become the Demon of the Twentieth Century." In Hoghuhi, M., *The Delinquent: Directions for Social Control*. London: Burnet Books 13, 1983; and Steinberg, L., "Juveniles on Trial: MacArthur Foundation Study Calls Competency into Question." *Criminal Justice Magazine*. Vol.18 No. 3, 2003. Available at [www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html](http://www.abanet.org/crimjust/juvjus/cjmag/18-3ls.html) (accessed 13 January 2011).

balance between the interest of the state in prosecuting criminal offenders and the offenders' basic human rights and needs. In this context, the thesis has examined the importance of the "due process rights" – i.e. the right to a fair trial and a public hearing by a competent, independent and impartial tribunal established by, and acting in accordance with the, law – in the administration of the criminal justice system generally and juvenile justice particularly.

### **8.2.2 Ensuring Effective Protection of Children's Rights**

Today, children's rights form a very fast growing body of normative principles and standards in international law. This is because the world community has committed itself to ensuring that the rights of the child are fully protected, as children are now considered one of the key beneficiaries of human rights. This was not the case before the 20<sup>th</sup> century. Before this period, children's rights were not given any consideration within the legal systems around the world, which facilitated consistent and sometimes legally-accepted abuses against children.<sup>1474</sup> This trend only changed from the latter part of the 19<sup>th</sup> century when human rights activists, legal scholars and jurists started to advocate for legal protection of children - beginning first with the rights of children in conflict with the law and later to all children's rights.<sup>1475</sup> It has, therefore, been observed that international children's rights norms have evolved, codifying the children's rights and standards particularly through the CRC and the ACRWC. It has also been noted that these international children's instruments, together with other international human rights instruments touching on children's

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<sup>1474</sup> See Chapter One of this Thesis.

<sup>1475</sup> As discussed in Chapters One and Three of this Thesis, the US was the first country to establish a juvenile court in 1889.

rights, have set out normative protection mechanisms (commonly called treaty bodies) through which the rights of the child can be vindicated.

### **8.2.3 The Evolution of Juvenile Justice and the Protection of Children in Conflict with the Law in International Law**

The thesis has considered the conception of the juvenile justice system in the late 1800s, which strived to reform US policies regarding youth offenders. The thesis has noted that prior to this period, misbehaving juveniles in the US, like in other parts of Western Europe, often faced arrest by the police, initial placement in the local jail with adults, and eventual institutionalisation in a house of refuge or workhouse.<sup>1476</sup> It has been argued that in the US juvenile justice, in its earliest form, was conceived and developed out of the need for a separate court for child offenders, away from the ordinary courts that dealt with offending adults. So, the first juvenile court was established in Cook County under the 1899 Illinois Juvenile Court Act; and by 1945 every State in the US had a juvenile court. From the early 20<sup>th</sup> century, the juvenile court was transplanted to Western Europe; and in England, it was given legal recognition through the enactment of juvenile justice-specific legislation.<sup>1477</sup>

In order to get a better understanding of the evolution of juvenile justice to its contemporary status, the thesis has analysed the three models of juvenile justice from its inception – the welfarism, back to justice and corporatism – as they have impacted on the development of modern-day juvenile justice. The thesis has also examined modern-day administration of juvenile justice in the context of the CRC and the

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<sup>1476</sup> Inciardi, J., *Criminal Justice*. 7<sup>th</sup> edn. New York/Oxford: Oxford University Press, 2002. p. 638. See also Pickett, R.S., *House of Refuge: Origins of Juvenile Reform in New York State, 1815-1857*. Syracuse: Syracuse University Press, 1969.

<sup>1477</sup> Pitts, J., "Youth Justice in England and Wales." In Mathews, R. and J. Young (eds.), *The New Politics of Crime and Punishment*. Devon, UK: William Publishing, 2003.

ACRWC and how these international children's rights instruments have influenced law reforms in many countries, particularly in African.

#### **8.2.4 State Obligations to Domesticated International Juvenile Justice Norms**

The thesis has noted that in many countries around the world, 'measures have been taken or are underway to bring existing laws, relevant to children in conflict with the law, in line with the provisions of the CRC, in particular article 40.'<sup>1478</sup> Whereas some countries, like Kenya, Tanzania and Uganda, have adopted a composite legislation constituting provisions for protection of rights of children in conflict with the law and those for the care and protection of children's rights in a single text, others have adopted separate legislation for the two aspects of children's rights. Whereas South Africa has adopted the latter after it ratified the CRC in 1995<sup>1479</sup> and the ACRWC in 2000<sup>1480</sup>; Tanzania ratified the CRC in June 1991 and the ACRWC in 2003. This means that South Africa and Tanzania are bound to implement the two children's rights instruments at the domestic level. Under both the CRC and ACRWC, all countries that have ratified these instruments have an obligation to implement them at a two-tier level. In the first place, ratifying countries have an obligation to implement these instruments through the international norm

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<sup>1478</sup> Doek, J., "Child Justice Trends and Concerns with a Reflection on South Africa." In Gallinetti, J., et al (ed.), *Child Justice in South Africa: Children's Rights Under Construction (Conference Report)*. Open Society Foundation for South Africa/Child Justice Alliance, August 2006, p. 12.

<sup>1479</sup> South Africa ratified the CRC on 16<sup>th</sup> June 1995. 16<sup>th</sup> June of every year is the day when the Day of the African Child is celebrated on the African continent in commemoration of the massacre of black children in South African in 1976.

<sup>1480</sup> South African signed the ACRWC on 10<sup>th</sup> October 1997, ratified it on 7<sup>th</sup> January 2000 and deposited the instrument on 21<sup>st</sup> January 2000.

enforcement mechanism. In the second place, the ratifying countries have obligations to implement the instruments at the domestic level.<sup>1481</sup>

As part of their international obligations, ratifying states are required to submit progressive reports to the UN Committee on the Rights of the Child (CROC) and the African Committee of Experts on the Rights and Welfare of the Child (ACERWC).<sup>1482</sup> The second aspect of states' obligations under the two instruments – domestic implementation – is of great significance;<sup>1483</sup> because 'the success or failure of any international human rights treaty should be evaluated in accordance with its impact on human rights practices at the domestic level.'<sup>1484</sup> Under both the CRC and the ACRWC, States Parties' obligations to implement these instruments in their respective jurisdictions are couched in such phraseology as States Parties shall take "measures to implement provisions and principles" in these instruments. The "measures" envisaged include adoption of legislation, review and introduction of policies and/or other administrative or programmatic measures, including budgetary allocations, for children in accordance with the laid constitutional and/or principles and processes.

The scope of domestic obligations imposed on the ratifying states by the international children's rights law has been expounded by the CROC in its General

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<sup>1481</sup> Odongo, G.O., "The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context." LL.D. Thesis, University of Western Cape, 2005, p. 68.

<sup>1482</sup> The mandate, reporting and monitoring mechanisms of the CROC and ACERWC are discussed at length in Chapter 3 above.

<sup>1483</sup> Heyns, C. and F. Viljoen, *The Impact of the United Nations Human Rights Treaties on the Domestic Level*. The Hague: Kluwer Law International, 2002, p. 1.

<sup>1484</sup> Odongo, op. cit, pp. 68-9.

Comment on “General Measures”<sup>1485</sup> on the implementation of the CRC. The CROC has expounded different mechanisms that are to be put in place and implemented at the domestic level, including the need for a comprehensive national strategy such as a National Plan of Action (NPA) on Children and setting up independent human rights institutions such as children’s ombudspersons and national human rights commissions. The measures also entail making children visible in budgets, training and capacity building, international co-operation within a rights-based development assistance approach and local cooperation with civil society, amongst other measures.<sup>1486</sup> In principle, the CROC has made it clear that ‘it believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation.’<sup>1487</sup>

With regard, to juvenile justice both Article 17 of the ACRWC and Article 40 of the CRC require that States Parties take necessary measures for the full realisation of basic rights by children who come into conflict with the law. For instance Article 40(3) of the CRC requires States Parties to adopt ‘laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law.’ This obligation ‘has been interpreted not only as requiring, at a minimum, that states establish juvenile justice systems but is also increasingly being construed as implying the need for distinct and

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<sup>1485</sup> CROC, General Comment No. 5: “General Measures of Implementation for the Convention on the Rights of the Child.” CRC/GC/2003/5 (Adopted at the 34<sup>th</sup> session on 27 November 2003).

<sup>1486</sup> Odongo, *op. cit.*, p. 70.

<sup>1487</sup> CROC, General Comment No. 5, *op. cit.*

dedicated legislation in the sphere of juvenile justice upon ratification of the Convention.<sup>1488</sup>

From this exposition, it can be noted that ‘the interpretation of the obligation to undertake juvenile justice law reform as requiring separate and distinct legislation dedicated to juvenile justice influenced the South African law reform process.’<sup>1489</sup> This has resulted in the enactment, by the Government of the Republic of South Africa, of the Child Justice Act, which is solely dedicated to juvenile justice; and the Children’s Act, which is dedicated to issues of child protection, care and welfare. In Tanzania, the Government has just enacted a composite Law of the Child Act, which combines provisions for child protection, care and welfare, on the one hand; and those regulating juvenile justice on the other. The thesis, therefore, examines the specific state obligations to domestic the international juvenile justice standards in both South Africa and Tanzania in the constitutional and legal contexts.

### **8.2.5 Domestication of International Juvenile Justice Norms in South Africa**

This thesis has observed that it is a well-established principle in international human rights law obliging states to domesticate human rights standards enshrined in a given international human rights instrument into their respective jurisdictions. Both the CRC and the ACRWC oblige States Parties thereto, *inter alia*, to domesticate international child rights standards, particularly those relating to children in conflict with the law. Such domestication is basically achieved through legislative efforts

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<sup>1488</sup> Odongo, op. cit, p. 71. See also Skelton, A., “Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice.” In Keightley, R. (ed.), *Children’s Rights*. Cape Town, Juta and Co., 1996, p. 183.

<sup>1489</sup> Odongo, *ibid*.

undertaken by States Parties thereto to give legal effect to the said instruments. In compliance with this requirement, South Africa has enacted the Child Justice Act (henceforth, the CJA) for the protection of children in conflict with the law as well as for the administration of juvenile justice system to domesticate international juvenile justice standards.

Therefore, the thesis has found that South Africa has domesticated international juvenile justice standards in the CJA by recognising and incorporating the international juvenile justice standards and the supremacy of the Constitution in the administration of juvenile justice in its jurisdiction. The thesis has also examined the objectives of, and the guiding principles underlying, the CJA. It has further examined the salient features of the CJA, which include exhaustive, comprehensive provisions relating to the minimum age of criminal responsibility (MACR) and the treatment of children under the MACR; methods of securing attendance of offending children in courts; release and detention or placement of children in conflict with the law; assessment of offending children; diversion and sentencing of children found to have offended penal law. In a very progressive way, the CJA contains provisions relating to parliamentary oversight of the implementation of the juvenile justice law.<sup>1490</sup> In translating these provisions into reality, it has been noted that the first submissions for parliamentary review were made in 2011.<sup>1491</sup> As noted in this study, the

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<sup>1490</sup> Section 96(3) of the CJA requires the Cabinet Member responsible for the administration of justice to consult with the Cabinet Members responsible for safety and security, social development, correctional services, education and health in order to submit reports from these associated departments to Parliament on the implementation of the Act. These reports must be submitted to Parliament within one year of the commencement of the Act and annually thereafter.

<sup>1491</sup> See particularly Waterhouse, S., "*Parliament Reviews the Implementation of the Child Justice Act.*" *Article 40*. Vol. 13 No. 2, 2011.



requirement to report to Parliament allows the legislature to exercise its oversight function through monitoring the implementation of the CJA and ensuring that implementation is consistent with the original intention of the legislation.<sup>1492</sup>

### 8.2.6 Domestication of International Juvenile Justice Norms in Tanzania

Notably, this thesis has observed that the need to provide legal protection to children in conflict with the law in international law cannot be over emphasised. Similarly, the thesis has noted that, in Tanzania this need has been expressed for a long time now.<sup>1493</sup> This call has been founded in many international human rights instruments, particularly basing on the principle set out in the Universal Declaration of Human Rights (UDHR) of 1948 to the effect that childhood is entitled to special care and assistance.<sup>1494</sup> The UDHR, in particular, has recognized similar provisions in the Geneva Declaration of Human Rights (1924) and the UN Declaration of the Rights of the Child (1959),<sup>1495</sup> which states that: ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth.’

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<sup>1492</sup> Ibid.

<sup>1493</sup> See particularly Law Reform Commission of Tanzania, “Report on Laws Relating to Children in Tanzania”. Submitted to the Minister of Justice and Constitutional Affairs, April 1994; Legal and Human Rights Centre, *The State of Juvenile Justice*. Dar es Salaam: Legal and Human Rights Centre, 2003; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*. Dar es Salaam: Tume ya Haki za Binadamu na Utawala Bora, 2004, p. 15.

<sup>1494</sup> See particularly Article 25 of the Universal Declaration of Human Rights.

<sup>1495</sup> The Declaration was adopted by the UNGA on 20<sup>th</sup> November 1959.

Thus, when the United Nations General Assembly (UNGA) adopted the Convention on the Rights of the Child (CRC)<sup>1496</sup> in 1989 there was already in existence other international instruments protecting the rights of children, particularly those in conflict with the law. Interestingly, the preamble to the CRC refers to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the “Beijing Rules”) in recognition that ‘in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration.’ According to principle 2 of the UN Declaration on the Rights of the Child: ‘The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.’

The United Nations Committee on the Rights of the Child (the “CROC”) has regularly emphasised that ‘all countries that have ratified the CRC need to ensure that their legislation is fully compatible with the provisions and principles of the CRC.’<sup>1497</sup> In respect of Tanzania, the CROC has, more than once, urged Tanzania to enact legislation that would effectively protect children’s rights. However, this was not done until 31<sup>st</sup> July 2009 when the Government of Tanzania introduced in

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<sup>1496</sup> The CRC was adopted and opened for signature, ratification and accession by the UNGA resolution 44/25 of 20<sup>th</sup> November 1989; and entered into force on 2<sup>nd</sup> September 1990, in accordance with Article 49.

<sup>1497</sup> African Child Policy Forum, *In the Best Interest of the Child: Harmonizing Laws in Eastern and Southern Africa*. Addis Ababa: African Child Forum/UNICEF, 2007, p.3.

Parliament a Bill to enact the Law of the Child Act (LCA)<sup>1498</sup>. This Bill was passed by Parliament into law on 4<sup>th</sup> November 2009 and assented to by President Jakaya Kikwete on 20<sup>th</sup> November 2009. Provisions relating to legal protection of children in conflict with the law have been, particularly, contained in Part IX of the LCA.

Therefore, the thesis has considered the prevalence of, and risk factors for, juvenile delinquency in Tanzania. It has also examined the impact of juvenile delinquency in society and how to prevent it. In a detailed account, the has critically examined provisions relating to the treatment of children in conflict with the law as set out in Part IX of the LCA; by particularly scrutinising its salient features – i.e., criminal capacity and minimum age of criminal responsibility; and the exposure of children in conflict with the law to the criminal justice system.

Other salient features relating to juvenile justice examined are the establishment of the Juvenile Court, its jurisdiction and applicable procedures. Methods of securing the attendance of a child in conflict with the law at the preliminary inquiry are also among the features examined in the thesis. In addition, the thesis has critically examined the procedure obtained in the release and/or detention of a child in conflict with the law pending his or her processing in the criminal justice system; and the manner of dealing with a child committing an offence in association with adults.

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<sup>1498</sup> The *Bill Supplement* in respect of this Bill was published in the *Gazette of the United Republic of Tanzania*, Vol. 90 No. 20, on 10<sup>th</sup> July 2009.

Furthermore, the thesis has critically considered the provisions relating to evidence adduced in court by a child as a witness; sentencing of a child; and placement of a child upon sentencing.

### **8.3 Inherent Challenges in Implementing the LCA in Relation to the Administration of Juvenile Justice**

The thesis has examined inherent challenges in the implementation of the LCA in relation to the administration of juvenile justice, as highlighted below:

- (i) Like in most Sub-Saharan African countries, both in South Africa<sup>1499</sup> and Tanzania<sup>1500</sup> there is no nationwide consolidated and disaggregated statistical data, despite the fact that juvenile delinquency is widespread. As the recent report of the MKUKUTA Monitoring System in Tanzania notes, the pattern of data relating to juvenile delinquency in recent years is erratic.<sup>1501</sup>
- (ii) The thesis has observed that in Tanzania there is lack of retention homes for placing children whose cases are pending and who have not been able to obtain bail as well as there is only one approved for placing convicted

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<sup>1499</sup> Waterhouse, S., "Parliament Reviews the Implementation of the Child Justice Act." *Article 40*. Vol. 13 No. 2, September 2011.

<sup>1500</sup> See Legal and Human Rights Centre, *The State of Juvenile Justice*, op. cit; Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*. Dar es Salaam: Tume ya Haki za Binadamu na Utawala Bora, 2004, p. 15; See particularly United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania*. Dar es Salaam: Research and Analysis Working Group/MKUKUTA Monitoring System, Ministry of Planning, Economy and Empowering, 2006; United Republic of Tanzania, "An Analysis of the Situation for Children in Conflict with the Law in Tanzania." Dar es Salaam: Ministry of Constitutional and Legal Affairs (MoCLA)/UNICEF, July 2011; and Commission for Human Rights and Good Governance, "Report on Situational Analysis of Children Deprived of their Liberty in Detention Facilities in Tanzania." Dar es Salaam, Commission for Human Rights and Good Governance, 2011.

<sup>1501</sup> United Republic of Tanzania, *Poverty and Human Development Report 2009*. Dar es Salaam: Research and Analysis Group (Ministry of Finance and Economic Affairs)/Research on Poverty Alleviation (REPOA), 2009, p. 127.

children. This problem has resulted in yet another problem: placing children in conflict with the law in same facilities with adults. As noted in Chapter Seven of the thesis, the Commission for Human Rights and Good Governance (CHRAGG) has expressed particular concern about the numbers of juveniles who are being detained in facilities with adults.<sup>1502</sup> The thesis has argued that the practice of placing offending children in adult remand or prison facilities breaches the principle enacted in Article 17(2)(b) of the ACRWC and Article 37(c) and (d) of the CRC, all of which require that children who are to be placed in detention must be placed in separate facilities from those housing adult offenders.

- (iii) The thesis has pointed out that the CROC has emphasized the need for a juvenile justice system to address the social roots of child offending. The CROC has thus consistently proposed, that the “Riyadh Guidelines” on Prevention of Juvenile Delinquency ‘should be regarded as providing relevant standards for implementation. The Guidelines requires “comprehensive prevention plans” to be instituted at every level of government and proposes that they should be implemented within the framework of the Convention and other international instruments.’<sup>1503</sup> However, the thesis has found that in Tanzania there are no any discernible measures devised, and currently being taken, by the state to prevent child offending in the country.
- (iv) The thesis has considered that unlike the CJA in South Africa, the LCA does not provide a separate, comprehensive set of legal provisions and procedures

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<sup>1502</sup> Ibid. See also Commission for Human Rights and Good Governance, *Annual Report for 2006/07*. Dar es Salaam: Commission for Human Rights and Good Governance (CHRAGG), 2008.

<sup>1503</sup> Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, op. cit, p. 546.

that apply specifically to children in conflict with the law.<sup>1504</sup> The LCA, which ‘represents a significant development in establishing a separate criminal justice system for children’<sup>1505</sup> by containing a number of provisions that specifically apply to children in conflict with the law, does not cover all aspects of the criminal justice process relating to children in conflict with the law as compared to the South African CJA.<sup>1506</sup> It ‘is limited to establishing and regulating proceedings before the Juvenile Court, the application of custodial and alternative sentences, and regulating Approved Schools.’<sup>1507</sup>

- (v) The thesis has noted that minimum age of criminal responsibility (MACR), pegged between 10 and 12 years of age, in Tanzania is lower than the proposed the international minimum standard, which is to be pegged between 14 and 16 years.<sup>1508</sup> As set out in the Penal Code, the “absolute” MACR is ten years. However, a child below the age of 12 years is not considered to be criminally responsible ‘unless it is proved that at the time of committing the act or making the omission he or she had capacity to know that he or she ought not to do the act or make the omission.’<sup>1509</sup> The thesis has argued that although this appears to offer protection to children between the ages of 10

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<sup>1504</sup> See particularly United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania.” Op. cit; and Mashamba, C.J., “A Child in Conflict with the Law under the Tanzanian *Law of the Child Act* (2009): Accused or Victim of Circumstances?” *The Justice Review*. Vo. 8 No. 2, 2009.

<sup>1505</sup> United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, *ibid*.

<sup>1506</sup> Examined in Chapter Six of this study.

<sup>1507</sup> See Legal and Human Rights Centre, *The State of Juvenile Justice*, op. cit; and Tume ya Haki za Binadamu na Utawala Bora, *Taarifa ya Ziara za Tume Wilayani na Ukaguzi wa Magereza na Vituo vya Polisi kwa Mwaka 2003/2004*, op. cit, p. 15.

<sup>1508</sup> See particularly United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit. the CJA in South Africa has amended the common law principle of criminal capacity by raising the minimum age of criminal capacity from 7 to 10 years.

<sup>1509</sup> See Section 15(2) of the Penal Code, Cap. 16 R.E. 2002.

and 12 years (by providing a presumption that a child aged 10 – 12 years is *doli incapax*) and appears to place an obligation on the state to rebut this presumption,<sup>1510</sup> the CROC has expressed concern about the practice of *doli incapax*. The CROC concerns have been expressed in its concluding observations on States Parties' reports and in its General Comment No. 10,<sup>1511</sup> emphasizing that it 'strongly recommends that States parties set a minimum age of criminal responsibility that does not allow, by way of exception, the use of a lower age.'<sup>1512</sup> In particular, the CROC, in its concluding observations on Tanzania in 2006, urged the government to 'clearly establish the age of criminal responsibility at 12 years, or at an older age that is an internationally accepted standard.'<sup>1513</sup>

- (vi) The thesis has noted that international children's rights law requires states parties to set up legal protection mechanisms for the treatment of children who commit criminal activities which may be offences had they been within the MACR. However, the thesis has observed that the LCA does not contain such legal protection. Available data indicates that children below the age of criminal responsibility in Tanzania are being processed through the criminal justice system.<sup>1514</sup>

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<sup>1510</sup> See particularly United Republic of Tanzania, "An Analysis of the Situation for Children in Conflict with the Law in Tanzania", op. cit.

<sup>1511</sup> General Comment No. 10, para 34, provides that: 'The Committee wishes to express its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible'.

<sup>1512</sup> *Ibid.*

<sup>1513</sup> CROC, "Concluding Observations: United Republic of Tanzania." UNCRC/C/TZA/CO/2, 21 June 2006, para 70(b).

<sup>1514</sup> Commission for Human Rights and Good Governance. "Report on Situational Analysis of Children Deprived of their Liberty in Detention Facilities in Tanzania", op. cit, p. 33; and United

- (vii) The thesis has observed that although international juvenile justice law requires that specialised units for children in conflict with the law be established within the police, the prosecution, the judiciary/court administration and social services,<sup>1515</sup> in Tanzania there is yet to evolve a specialised juvenile justice system.<sup>1516</sup> Currently, there are no juvenile justice personnel especially trained on juvenile justice; there are not specialised courts (with only juvenile court at Kisumu in Dar es Salaam); as well as with only five retention homes and only one approved school. In addition, there is limited budget set out for the administration of juvenile justice.
- (viii) The thesis has found that although under subsection (2) of Section 97 of the LCA, ‘the Chief Justice may, by notice in the *Gazette*, designate any premises used by a primary court to be a Juvenile Court,’ up until now the Chief Justice has not been able to designate any premises to be used as a juvenile court.
- (ix) The thesis has argued that the procedure in the Juvenile Court set out in Section 99(1) of the CJA is not exhaustive, but there is a room for the Chief Justice to make rules for that purpose. However, the thesis has noted that up until now the Chief Justice has not made such rules of procedure to regulate the proceedings in the Juvenile Court. To the contrary, in South Africa rules

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Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.

<sup>1515</sup> General Comment No. 10, paras 92, 93 and 94.

<sup>1516</sup> United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania”, op. cit.



of procedure (made under the CJA) applicable in the juvenile court have been made and are already applicable.<sup>1517</sup>

- (x) The thesis has observed that Sections 108(2) and 112 of the LCA allow parents, guardian, relatives or social welfare officer to attend, with the prior consent of the court, to assist the accused child in the conduct of his case and, in particular, in the examination and cross-examination of witnesses. However, these provisions have failed to appreciate the fact that a child is entitled to free legal aid granted by the State, as opposed to its counter-part, the South African CJA.<sup>1518</sup>
- (xi) In particular, the thesis has argued that one of the problematic sections relating to the procedure in the Juvenile Court is Section 107, which simply states that: ‘Where the statement made by the child amounts to a plea of guilty the court may convict him.’ The thesis has noted that if not applied carefully by the courts due to their tender age and ignorance of the legal consequences of the sanctions relating to the offences with which they are charged, many children may find themselves being summarily convicted by the courts. It would be expected that this section ought to have set out some pre-requisites for such summary conviction. This would include the court warning and satisfying itself if – given the age and level of knowledge the

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<sup>1517</sup> See particularly the Directives of the National Director of Public Prosecutions, made under Section 97(4)(a) of the CJA (published in *Government Gazette* No. 33067 on 31 March 2010; National Instruction 2/2010 Children in Conflict with the Law (approved and published in the *Government Gazette* No. 33508, for general information, on 2 September 2010; and the Policy Framework for the Accreditation and Quality Assurance of Diversion Services in South Africa (approved on 26 May 2010 by the Portfolio Committee for Justice and Constitutional Development. An invitation for applications for the accreditation of diversion programmes and diversion service providers was published in *Government Gazette* No. 33469 on 20 August 2010).

<sup>1518</sup> The need for provision of free legal aid to children in conflict with the law is discussed in part 7.5 of this Chapter.

child possesses as well as the circumstances of the case – the offending child possesses sufficient knowledge to know the impact of such plea of guilty.<sup>1519</sup>

- (xii) The thesis has noted that under paragraph 52 of its General Comment No. 10 (2007), the CROC ‘recommends that States Parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to bring charges against the child, and the final adjudication and decision by the court or other competent judicial body.’ However, the LCA does not set out such timeframe, which would guarantee expeditious and certain disposition of cases in the Juvenile Court, particularly in a judicial system fraught with inordinate delays in determination of cases like Tanzania.<sup>1520</sup>
- (xiii) The thesis has considered provisions relating to diversion in the LCA, which are scanty and limited only to few situations such alternatives to custodial

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<sup>1519</sup> In *Buhimila Mapembe v R.* [1988] TLR 174,<sup>1519</sup> Chipeta, J. (as he then was), *inter alia*, held that, in any case in which a conviction is likely to proceed on a plea of guilty, it is most desirable not only that every constituent of the charge should be explained to the accused but that he should be required to admit or deny every element of it unequivocally.

<sup>1520</sup> For a detailed account of the magnitude of the problem of delays of cases in Tanzanian courts, *see* particularly United Republic of Tanzania, *Financial and Legal Sector Upgrading Project (FILMUP)*, “Legal Sector Report”. Dar es Salaam: Government Printer, 1996; United Republic of Tanzania, *Legal Sector Reform Programme: Medium Term Strategy (2005/06-2007/08)*. Dar es Salaam: Government Printer, 2004; Ministry of Justice and Constitutional Affairs, *A Vision of Accessible and Timely Justice for All in the New Millennium*. Dar es Salaam: Government Printer, 2004; Mashamba, C.J., “Access to Justice and State Policy Considerations in Tanzania.” *The Justice Review*. Vol. II No. 2, 2006; United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania*. Dar es Salaam: Research and Analysis Working Group, MKUKUTA Monitoring System (then under the Ministry of Planning, Economy and Empowering), 2006; and Mashamba, C.J., “Overview of the Implementation of Cluster III of MKUKUTA: Governance and Accountability.” *The Justice Review*. Vol. IV No. 5, 2007.

sentences. Unlike the LCA, the CJA contains comprehensive provisions relating to diversion programmes in South Africa.<sup>1521</sup>

- (xiv) Unlike the LCA, the Zanzibar Children's Act (2011)<sup>1522</sup> and the South African Children's Act (2005)<sup>1523</sup> contain a clear enumeration of factors constituting the best interests of the child.
- (xv) The thesis has pointed out that the LCA does not abolish corporal punishment on children, particularly in the administration of the juvenile justice system.
- (xvi) The thesis also argues that the LCA also does not establish a central body to coordinate the work and functions of the juvenile justice agencies and actors: the police, judiciary, (the prisons department<sup>1524</sup>), the social welfare department as well as civil society organisations working with and for children in the country.<sup>1525</sup>

#### **8.4 General Recommendations**

From the observations and findings set out above, this thesis provides two general recommendations: the need to have child-specific provisions in the envisaged new constitution of Tanzania and a review of the LCA with a view to making more comprehensive and progressive.

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<sup>1521</sup> See particularly Section 51 of the CJA. The objects of the CJA, as set out in Section 2, include the use of diversion as a means to prevent children being exposed to the adverse effects of the formal justice system.

<sup>1522</sup> See particularly Section 4 of the Zanzibar Children's Act (2011).

<sup>1523</sup> See particularly Section 7 of the South African Children's Act (2005).

<sup>1524</sup> The prisons department is included here as a juvenile justice agency as it currently holds of most of the remanded and imprisoned children in Tanzania as a result of lack of Retention Homes and Approved School as discussed in part 7.1 above.

<sup>1525</sup> Only recently a loose Child Justice Forum (CJF) was set up under the coordination of the Ministry of Constitutional and Legal Affairs (MoCLA). The CJF, which is a result of the recommendations made in two studies (on juvenile justice and on access to justice for under 18's) conducted by nola and Coram Children Legal Centre (Essex University, UK) under UNICEF funding, adopted a five-year Strategy in February 2012 that would ensure, *inter alia*, that activities and programmes undertaken by stakeholders are adequately improved and coordinated.

#### 8.4.1 Constitutionalisation of the Rights of Children in Conflict with the Law

In modern constitution-making, the need to constitutionalize human rights generally and children's rights particularly emanates from the assumption that 'the constitution is the supreme law of the land and therefore any law or conduct inconsistent with it is void.'<sup>1526</sup> Therefore, constitutionalisation of basic rights is 'an attempt to entrench such rights in not only the highest law in the country for justiciable purposes, but also to flag the primary purpose for the existence of the state namely; the promotion and protection of human dignity, equality for all, and human rights.'<sup>1527</sup> It is, therefore, pertinent that 'countries become alive to the need to strengthen democracy by ensuring Children Rights in their constitutions as they have done with Human Rights.'<sup>1528</sup> In principle, it can be argued that respect for a constitution 'increases when basic rights and fundamental freedoms (including children's rights) are guaranteed in a constitution via a Bill of Rights.'<sup>1529</sup>

In the light of the foregoing amplification, many States Parties to the CRC and the ACRWC have adopted constitutional measures to domesticate the provisions of enshrined not only in these treaties, but also in other international human rights treaties. This has been evidenced by the constitutionalisation of children's rights in the Bills of Rights in the recently-promulgated Constitution of Kenya (2010), in the

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<sup>1526</sup> Mutungi, O. K., "The Constitutionalisation of Basic Rights." In Constitution of Kenya Review Commission, "Report of the Constitution of Kenya Review Commission." Approved for Issue at the 68<sup>th</sup> Meeting of the Commission held on 10<sup>th</sup> April 2003. Available online at <http://www.ldphs.org.za/resources/local-government-database/by-country/kenya/commission-reports/Devolution%20and%20constitutional%20development%20papers.pdf> (accessed 2 January 2013), p. 174.

<sup>1527</sup> Ibid.

<sup>1528</sup> Muthoga, L.G., "International Conventions of the Rights of the Child." In Constitution of Kenya Review Commission, "Report of the Constitution of Kenya Review Commission", *ibid*, p. 202.

<sup>1529</sup> Mukangara, D.R., "Forms and Reforms of Constitution-Making with Reference to Tanzania." *UTAFITI [New Series) Special Issue* Vol. 4, 1998-2001, pp. 131-150, p. 141.

1995 Uganda Constitution as well as the 1996 South African Constitution, to mention but a few examples. As considered in Chapter Five, the constitutionalisation of children's rights in these constitutions has helped to give these rights a constitutional basis upon which violations of the rights can be constitutionally vindicated. It is, therefore, proposed that the envisaged new constitution<sup>1530</sup> for Tanzania to be adopted later this year<sup>1531</sup> should also contain the rights of children, particularly those in conflict with the law.

#### **8.4.2 A Call for Review of the LCA Provisions Relating to the Administration of Juvenile Justice**

In order to overcome the problems identified in the examination of the LCA in the context of the international juvenile justice law as well as the South African CJA in relation to the administration of juvenile justice in the Tanzania, there is a dire need to review the relevant provisions in the LCA. Such review should aim at further harmonisation of the law relating to juvenile justice in Tanzania with the international juvenile justice norms. One of the critical areas of concern in this regard should the need to have a separate child justice law like in South Africa. The separate child law should be prepared along with the rules and regulations to be made under it, in order to avoid the existing situation where regulations and rules which are supposed to be made under the LCA have not been made by the relevant authorities.

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<sup>1530</sup> From April 2012 Tanzania embarked on the review of its current Constitution with a view to adopting a new one as envisaged under the Constitutional Review Act, Cap. 83 R.E. 2012. The constitutional review and re-writing process is overseen by the Constitutional Review Commission established under this law.

<sup>1531</sup> See particularly *Raia Mwema* newspaper (Dar es Salaam), "Jaji Warioba kukabidhi Katiba Oktoba: Kwenda Bunge la Katiba Novemba". Issue No. 281, 6-12 February 2013, p. 2.

## 8.5 Specific Recommendations

This part summarizes recommendations in respect of the inherent gaps observed in the course of this study.

### 8.5.1 Strengthening Data Collection and Management Systems

The importance of statistical data and information in the administration of juvenile justice in any legal system is pivotal to the better functioning of the system. In this thesis it has, however, been observed that there is no nationwide consolidated and disaggregated statistical data, whereby the pattern of data relating to juvenile delinquency in recent years is erratic.<sup>1532</sup> In order to address this anomaly, it is critical that the concerned juvenile justice authorities should make sure that there is in place an effective data collection and management system that would help to generate statistical data and information that is updated and cover all aspects of the administration of juvenile justice. Such statistical data and information would help policy- and decision -makers in adequately and effectively budgeting and planning for children.<sup>1533</sup> The concerned juvenile justice personnel also should be specifically trained in data collection, maintenance and dissemination to enable them to effectively discharge their functions.

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<sup>1532</sup> United Republic of Tanzania, *Poverty and Human Development Report 2009*. Dar es Salaam: Research and Analysis Group (Ministry of Finance and Economic Affairs)/Research on Poverty Alleviation (REPOA), 2009, p. 127.

<sup>1533</sup> Konga, B.H., "Budgeting for Children." A paper presented at a workshop on budgeting for the child's best interests for government officials, organised by the National Organisation for Legal Assistance (**nola**) and Mkombozi Children's Centre, held at Landmark Hotel, Dar es Salaam, on 15 May 2012.

### 8.5.2 Establishment of Retention and Reformatory Facilities

This thesis has reaffirmed the international juvenile justice law requirement that the deprivation of liberty in relation to children should be considered as a matter of last resort, undertaken in the best interests of the child and only for a shortest possible period. It has been contended that where it is considered to be in the best interests of the child to deprive the child of his or her liberty, the placement facility should separate from the one used by adult offenders.<sup>1534</sup> However, this thesis has observed that in Tanzania there is lack of retention homes for placing children whose cases are pending and who have not been able to obtain bail as well as there is only one approved for placing convicted children. As noted in the thesis, this problem has resulted in yet another problem: placing children in conflict with the law in same facilities with adults.

In a bid to address the foregoing challenge, argued that the State should ensure that there are sufficient retention and reformatory facilities<sup>1535</sup> throughout the country to ensure that all children who deprived of their liberty are placed in separate facilities. In addition, the facilities should be constructed in such a way that they will not impede the child's realisation of his or her rights while placed therein – including the right to education, the right to health, freedom of belief as well as the right to leisure and recreation.

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<sup>1534</sup> Article 17(2)(b) of the ACRWC and Article 37(c) and (d) of the CRC require that children who are to be placed in detention must be placed in separate facilities from those housing adult offenders.

<sup>1535</sup> See particularly United Republic of Tanzania, *Status Report 2006: Progress Towards the Goals for Growth, Social Wellbeing and Governance in Tanzania*. Dar es Salaam: Research and Analysis Working Group, MKUKUTA Monitoring System, which is under the Ministry of Planning, Economy and Empowering, 2006, p. 27.

### **8.5.3 Putting in Place Measures to Prevent Offending by Children**

This thesis has pointed out that although the CROC has emphasized the need for a juvenile justice system to address the social roots of offending in the context of the “Riyadh Guidelines” on Prevention of Juvenile Delinquency in Tanzania there are no any discernible measures devised, and currently being taken, by the state to prevent child offending in the country. It is, therefore, urged that the relevant juvenile justice authorise should put in place “comprehensive prevention plans”, which aims at preventing offending by children, to be instituted at every level of government and proposes that they should be implemented within the framework of the CRC, ACRWC and other international instruments.<sup>1536</sup>

### **8.5.4 Establishing and Strengthening a Separate Juvenile Justice System**

It has been noted in this thesis that although the LCA was intended to domesticate international law norms relating to children’s rights, it has failed to fully incorporate international juvenile justice norms. In particular, unlike the CJA in South Africa, the LCA does not provide a separate, comprehensive set of legal provisions and procedures that apply specifically to children in conflict with the law.<sup>1537</sup> Therefore, it is urged that the review of the LCA as proposed in part 8.2 above should be geared towards ensuring that the international law requirement to have a separate, comprehensive set of laws, rules, regulations and procedures on administration of juvenile justice is adequately provided for in the law.

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<sup>1536</sup> Hodgkin, R., and P. Newell, *Implementation Handbook for the Convention on the Rights of the Child*, op. cit, p. 546.

<sup>1537</sup> See particularly United Republic of Tanzania, “An Analysis of the Situation for Children in Conflict with the Law in Tanzania.” Op. cit; and Mashamba, C.J., “A Child in Conflict with the Law under the Tanzanian *Law of the Child Act* (2009): Accused or Victim of Circumstances?” *The Justice Review*. Vo. 8 No. 2, 2009.



In addition, specialised units for children in conflict with the law should be established within the police, the prosecution, the judiciary, the court administration and social services.<sup>1538</sup> Juvenile justice personnel should be especially trained on juvenile justice; as well the government should set out sufficient budget to all juvenile justice agencies for the administration of juvenile justice.

### **8.5.5 Bringing the MACR into Full Compliance with International Juvenile Justice Law**

Given the finding that the minimum age of criminal responsibility (MACR) (10 and 12 years) prevalent in Tanzania is low compared to the international standard, it is urged that the government should bring it in full compliance with the CROC's recommendation in its concluding observations on States Parties' reports and in its General Comment No. 10.<sup>1539</sup> The new MACR should be pegged at '12 years, or at an older age that is an internationally accepted standard.'<sup>1540</sup>

It is also urged that Tanzania should replicate South Africa by amending the LCA and the Penal Code so that the ladders for determination of age of an offending child in existence in the latter applies also in the former. This will entail that the police, social welfare/probation services, the prosecution and the court will also be vested with a mandatory duty to determine the age of an offending child who come into

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<sup>1538</sup> General Comment No. 10, paras 92, 93 and 94.

<sup>1539</sup> General Comment No. 10, para. 34, provides that: 'The Committee wishes to express its concern about the practice of allowing exceptions to a minimum age of criminal responsibility which permit the use of a lower minimum age of criminal responsibility in cases where the child, for example, is accused of committing a serious offence or where the child is considered mature enough to be held criminally responsible'.

<sup>1540</sup> CROC, "Concluding Observations: United Republic of Tanzania." UNCRC/C/TZA/CO/2, 21 June 2006, para. 70(b).

contact with them. Tanzania should also emulate South Africa on having provisions in its LCA and the Penal Code on how to deal with children under the MACR who are involved in criminal activities or behaviours, which should also go hand-in-hand with the setting up of alternative placement facilities for such children.

#### **8.5.6 Enacting Provisions to Regulate the Treatment of Children below the MACR**

In order to avoid arresting and prosecuting children who are below the MACR, the Government of Tanzania is urged to enact provisions that would provide a clear procedure on how to deal with children who commit criminal activities which may be offences had they been within the MACR. The South African CJA can serve as a best practice in this regard.

#### **8.5.7 Adopting Rules of Procedures in the Juvenile Court**

Although under subsection (2) of Section 97 of the LCA, ‘the Chief Justice may, by notice in the *Gazette*, designate any premises used by a primary court to be a Juvenile Court,’ the thesis has noted that up until now the Chief Justice has not been able to designate any premises to be used as a juvenile court. This means that the Juvenile Court is yet to start applying the LCA. It is, therefore, recommended that the CJ should ensure that the rules of procedure are made, in consultation with all relevant stakeholders.

#### **8.5.8 Providing Legal Assistance to Children in Conflict with the Law**

In order to ensure that Tanzania complies with international law requirement to provide free legal assistance to children in conflict with the law, it is urged that the

law is amend to entrench this rule. It is not just enough to allow parents, guardian, relatives or social welfare officer to participate in court proceedings to assist the accused child in the conduct of his case<sup>1541</sup> without providing such child with legal assistance. This is true in a country where the majority of parents or guardians cannot meet the exorbitant legal fees charged by advocates.

#### **8.5.9 Clearing the Ambiguity in Section 107: The Problematic Plea of Guilty**

As noted in Chapter Seven, Section 107, this simply states that: ‘Where the statement made by the child amounts to a plea of guilty the court may convict him,’ is ambiguous and needs to be rectifying in the context of the decisions of the High Court in *Buhimila Mapembe v R.*<sup>1542</sup>

#### **8.5.10 Setting Timeframe for Determination of Cases in the Juvenile Court**

Although in paragraph 52 of its General Comment No. 10 (2007), the CROC recommends that States Parties should set and implement time limits for the period between the commission of the offence and the final adjudication and decision by the court or other competent judicial body, the thesis has noted that the LCA does not set out such timeframe, which would guarantee expeditious and certain disposition of cases in the Juvenile Court, particularly in a judicial system fraught with inordinate delays in determination of cases like Tanzania.<sup>1543</sup> It is, therefore, urged that the LCA

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<sup>1541</sup> Sections 108(2) and 112 of the LCA.

<sup>1542</sup> [1988] TLR 174.

<sup>1543</sup> For a detailed account of the magnitude of the problem of delays of cases in Tanzanian courts, see particularly United Republic of Tanzania, *Financial and Legal Sector Upgrading Project (FILMUP)*, “Legal Sector Report”. Dar es Salaam: Government Printer, 1996; United Republic of Tanzania, *Legal Sector Reform Programme: Medium Term Strategy (2005/06-2007/08)*. Dar es Salaam: Government Printer, 2004; Ministry of Justice and Constitutional Affairs, *A Vision of Accessible and*

should be amended to ensure that every action in the proceedings in the Juvenile Court has a time limit within which it can be finalised.

#### **8.5.11 Enacting Comprehensive Provisions Relating to Diversion**

The importance of having statutory provisions regulating diversion has been highlighted in South Africa. Such provisions should clearly state the role of different juvenile justice actors at different levels in the application of diversion in the administration of juvenile justice.<sup>1544</sup> However, the thesis has that in the LCA there are scanty and limited only to few situations such alternatives to custodial sentences. It is urged that the LCA should be amended so as it can contain comprehensive provisions relating to diversion programmes in the context of the South Africa.<sup>1545</sup>

#### **8.5.12 Abolishing Corporal Punishment**

Although international juvenile justice law prohibits the imposition of corporal punishment in the administration of juvenile justice, the LCA does not abolish corporal punishment on children in conflict with the law. It is urged that the LCA should be amended so that it can outlaw corporal punishment not only in the administration of juvenile justice, but in all aspects relating to the child.

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<sup>1544</sup> See particularly Badenhorst, C., *Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good Intentions, Questionable Outcomes*. Pinelands (South Africa): Open Society Foundation for South Africa, 2010; and Gallinetti, J., *Getting to Know the Child Justice Act*. Bellville: Child justice Alliance, 2009.

<sup>1545</sup> See particularly Section 51 of the CJA. The objects of the CJA, as set out in Section 2, include the use of diversion as a means to prevent children being exposed to the adverse effects of the formal justice system.

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### **Concluding Observations/Recommendations**

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